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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IVAN QUIÑONES and HECTOR CASANOVAS,
Petitioners,

v.

JOSE LEMA-MOYA, ENRIQUE MENDEZ and CARMEN SONIA ZAYAS,
Secretaries of the Departments of Education, Health and Social Services of the Commonwealth of Puerto Rico,
Respondents.

PETITION FOR A WRIT FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI

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June 12, 1989

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QUESTION PRESENTED

Whether the circuit court rightly issued its writ of supervisory mandamus to correct the lower court's alleged error in interpreting the parties' court-approved bilateral agreements as a binding "consent decree" and to rescind, at an interlocutory stage of the proceedings, and without the benefit of a full record, said agreements.

LIST OF PARTIES*

Petitioners before this Court include Iván Quiñones and Héctor Casanova. Respondents before this Court are the Secretary of the Department of Education, the Secretary of the Department of Health and the Secretary of the Department of Social Services of the Commonwealth of Puerto Rico.

The parties to the proceedings below were the same petitioners and respondents before this Court.

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* Respondents in the proceedings below before the Circuit Court were Awilda Aponte-Roque, Luis Izquierdo-Mora and Carmen Sonia Zayas, who were then the Secretaries in office for the Departments of Education, Health and Social Services of the Commonwealth of Puerto Rico. Respondents now before this Court are their legal successors in office.

Victor Ramírez, Roberto Nieves, Marisol Nieves, Carmen Soto and José Vázquez, all originally named plaintiffs are no longer part of this case, their claims having been dismissed or waived at the district court level.

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PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals, 861 F.2d 328 (1st Cir. 1988), appears in Appendix A. The opinion and order of the District Court for the District of Puerto Rico, has not been reported. It is represented in Appendix B.

JURISDICTION

The judgment and opinion of the Court of Appeals for the First Circuit was entered on November 17, 1988. Petition for rehearing was denied on January 13, 1989.

On April 3, 1989, Justice William J. Brennan, Jr. ordered that the time for filing this petition for writ of certiorari be extended to and including June 12, 1989.

The jurisdiction of the Court to review the judgment and opinion of the First Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1291.

> The courts of appeals (other than the United States Court of Appeals for the Federal Court) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1651(a). Writs

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

The issue in this case is whether the court of appeals, under the aegis of its supervisory powers

over district courts, can mandate to vacate the encompassing judicial interpretation made by the lower court concerning the parties' responsibilities and obligations under joint stipulations, entered and approved before the district court, to provide a comprehensive system of health services for Puerto Rico mentally retarded population, thus rescinding the judicial joint agreements and unwarrantly and prematurely intervening with the district court's inherent powers to direct and supervise the interlocutory proceedings before its consideration.

The initial complaint in this case was filed in 1977 as a civil rights class suit challenging the quality of services provided to mentally retarded persons in Puerto Rico and requesting declaratory and injunctive relief against the then respective Secretaries of Health, Social Services and Education of the Commonwealth of Puerto Rico in their individual and official capacities.

The jurisdiction of the district court as alleged in the amended complaint was invoked under 42 U.S.C. § 1983; 5th., 8th., and 14th. Amendments of the United States Constitution; Art. 2 § 5 of the Constitution of the Commonwealth of Puerto Rico; § 201 of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010; § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 and 28 U.S.C. § 1343(3). Declaratory and injunctive reliefs were requested pursuant to 28 U.S.C. § 1651, § 2201 and § 2202; 42 U.S.C. § 1983; and Rule 57 of the Federal Rules of Civil Procedure.

After extensive discovery and consideration of interlocutory issues, the parties commenced to consider

a possible settlement agreement during the year of 1983.

On January 31, 1984, the parties filed a joint motion presenting the district court with a stipulated agreement including, as an integral part of the same, Executive Order No. 4234, signed by the Governor of Puerto Rico. The joint motion read:

> In the present action a Pretrial Conference was held on April 11, 1983, before Hon. Jesús A. Castellanos, U.S. Magistrate. A Pretrial Order was filed on the same date. The Trial was set for September 20, 1983, but due to the possibility of an agreement between the parties a Status Conference was held on October 19, 1983.
>
> At said conference the parties informed this Court that they had reached an agreement based on the proposed improvements and additions of the health services being provided by the Commonwealth of Puerto Rico to the minor and adult population with some type of mental retardation.
>
> The arrangement between the parties is the following:
>
> 1. The parties agree that plaintiffs will paralyze (sic) the prosecution of this suit for the period of a year and a half from the date of filing of this motion if the terms and conditions of the Executive Order, included as Exhibit A of this motion, are met.
> 2. The parties will file a joint status report every six months, beginning on

the file date of the filing of this motion. Said report shall include the status of compliance with the terms and conditions of the Executive Order, which is included as Exhibit A of this motion,

Respectfully submitted.

The governor's Executive Order set forth the problems of providing services for the mentally retarded population, committed the government to a plan of remedial action and fixed time limits for compliance:

EXECUTIVE ORDER FROM THE GOVERNOR OF THE COMMONWEALTH OF PUERTO RICO

TO FIX UPON THE MENTAL HEALTH AUXILIARY SECRETARY OF THE DEPARTMENT OF HEALTH OF THE COMMONWEALTH OF PUERTO RICO THE RESPONSIBILITY OF PROVIDING THE COMPREHENSIVE MENTAL HEALTH SERVICES NECESSARY TO THE MINOR AND ADULT POPULATION WITH SOME TYPE OF MENTAL RETARDATION:

WHEREAS: A mentally retarded is a person who has a mental condition which occurs in the development phase, making it to function at a level below the intellectual average of the other persons, there being 4 classes which are: slight, moderate, severe and deep retardation.

WHEREAS: Among others, the Department of Health, Social Services Department, and the Public Education Department receive funds, state as well as federal, to work with the mental retardation problem in Puerto Rico; among these funds there are some that are identified as funds to provide medical, psychiatric and psychological services to this population.

WHEREAS: It is necessary to identify the programs, services and funds referred to in the previous Whereas and once identified, to proceed to develop a plan to unite all of these services, programs and funds.

WHEREAS: The Department of Health will be the agency responsible to evaluate, diagnose and provide medical psychiatric and/or psychological services to the population suffering of mental retardation; minors as well as adults of the Commonwealth of Puerto Rico. The responsibility for the education of this population is fixed upon the Public Education De-

partment of the Commonwealth of Puerto Rico.

WHEREAS: Legislative endeavors must be carried out for the next ordinary Legislative Assembly to order all concerned agencies to transfer to the Department of Health all budget, personnel, equipment and responsibilities they have in relation to the mentally retarded, except the budget, personnel and equipments directly related to the special education of this population. Legislation must include the budget that is necessary for these purposes.

THEREFORE: I, CARLOS ROMERO BARCELO, Governor of the Commonwealth of Puerto Rico, pursuant to the authority granted by law, herewith order the unification under the Department of Health of all existing services for the minor and adult population with some type of mental retardation, said unification is done with the purpose of once the existing services are identified and united,

the Department of Health will formulate a comprehensive health services system for said population incorporating the existing services and those newly created which are necessary and that, besides to gather all and each one of the topics mentioned in all the Whereas of this Executive Order.

THEREFORE: The identification of programs, services and funds must be done in a period not greater than 6 months since the date of this Executive Order. Once the programs services or funds have been identified, the mental Health Auxiliary Secretary of the Department of Health will have one year to elaborate the plan to unify these services and develop the services system; at the end of said year, the plan must be available for the consideration and approval by the Governor. Once said plan and the services system is approved, they must be developed and implemented in

a period not greater than 10 years.

The district court approved this joint agreement on February 2, 1984, subject to the condition that the parties shall file a joint status report every six months.

Years later, on March 5, 1987, the parties filed a joint status report and leave for amendments to their agreement of January 31, 1984. The amended joint agreement was approved by the court on March 11, 1987. This second joint agreement restated the terms of the Executive Order 4234, noting that the court had granted several extensions to file a comprehensive health services system plan, listed the documents prepared by defendants in the last years, all of which were found waiting by plaintiffs and concluded:

a. A plan for the creation of a "Comprehensive System of Health for the Mentally Retarded" is still necessary.

b. The identification of the programs, services and funds by which the various components of the Commonwealth Government's Executive Branch provide medical, psychiatric and psychological services to mentally retarded adults and minors has to be expanded and updated.

c. Follow up is required on legislation which would order the transfer to the Department of Health of all budget, personnel, equipment and responsibilities related to the provision of services to the mentally retarded, with the exception of those services provided by the Department of Ed-

ucation which would remain this latter agency's responsibility.

The timetable, proposed by the parties and approved by the court for Plan preparation, approval and submission to the court provided:

(A) The consultant will be contracted and commence work within one month from the signing of this Status Report or, in other words by April 2, 1987.

(B) The consultant will complete the proposed Plan, a copy of which shall be provided to Plaintiffs upon completion for examination within, two months of having been contracted, or in other words by June 2, 1987.

(C) Plaintiffs will review the proposed Plan, exchange comments and suggest modifications to the Plan or request a Court hearing within thirty days after its receipt.

(D) Defendants will review and modify Plan, if necessary, within thirty days after commentaries are submitted by Plaintiffs.

(E) Once the parties agree on the Plan, and unless, in the case of disagreement a hearing is requested before the Court, it will be presented to the Governor of the Commonwealth of Puerto Rico for his consideration and approval and, thereafter, submitted to this Court.

Despite these specific amended stipulations concerning particular procedures for the preparation of

a Plan and its final adoption and implementation, defendants failed to produce the expected document.

In their motion of September 21, 1987 defendants submitted what they called a two-year plan which basically consisted of a list of existing services for the mentally retarded and requested the Court to accept it as an alternative for submitting a comprehensive health services system plan, thus in a clear attempt to unilaterally modify the terms and conditions agreed upon by the parties in the two existing stipulated agreements.

By this time the Court had appointed a special master in this case with specific instructions to assist the Court in the constant and effective monitoring of full compliance with the agreements' terms and conditions, and in particular, with the preparation and implementation of a comprehensive health services system plan for the mentally retarded.[1]

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[1] The reasons for the appointment of a special master, as stated in the district court's order of reference were:

> This action was filed on April 19, 1977.
>
> Due to the exceptional condition of this case involving the need to constantly and effectively monitor the activities of the defendants in their compliance with their obligations under the Court's Order dated December 20, 1983 (hereinafter "Orders") which have been hitherto unavailing without justification and to eliminate the likelihood of continued failures to meet the obligations which have resulted in unnecessary delays in the preparation and implementation of a plan or system for the care, treatment, and custody of the mentally retarded of this Commonwealth, the Court hereby determines that it is necessary that a special master be appointed pursuant to Rule 53 of the Federal Rules of Civil Procedure.

A hearing was called by the special master for December 16, 1987. The purpose of the hearing, as contemplated in the Joint Status Report of March 5, 1987 was to clarify and review the documents submitted by defendants on August and September of 1987 (Planning Document for the Elaboration of a Plan. . . . and Plan for Servicing the Population with Mental Retardation FY 1987-88, 1988-89) and to hear and consider plaintiffs' reactions to these.

On December 16, 1987, prior to the beginning of the hearing before the master, defendants presented the master and plaintiff's counsel with copies of their recently filed motion to court:

a. Motion regarding current status of the case and request for trial.

b. Motion in request of continuance of hearing set by Master for December 16, 1987.

In their motion regarding current status of the case and request for trial, as amended, defendants avered, first, unsurmountable disagreements between the parties as to the acceptance of the proposed plan, and second, defendants questioned the jurisdiction of the court in the case, basically bringing forth sovereign immunity defenses under the Eleventh Amendment and requesting the court to put aside the joint stipulations and set the case for trial.

Defendants never challenged before the district court the final nature of the settlement agreements and consent decrees entered by the parties and approved by court.

Plaintiffs replied defendants' motion requesting trial asserting that the court had jurisdiction over the case

since the complaint satisfied federal question jurisdictional criteria and, more important, because defendants, by virtue of the settlements and stipulations freely, intelligently, expressly and unequivocally waived the sovereign immunity defenses that could assist them under the Eleventh Amendments.

Plaintiffs insisted on the legality and binding effects of the joint stipulations and were firmly opposed to defendants' attempts to unilaterally disregard their obligations and to reinstate the litigation.

On February 26, 1988, the district court issued an opinion and order and decided that:

a. The instant case presents the Court with essential matters in controversy, specifically those contained in the complaint allegations arising under the 5th., 8th., and 14th. Amendments of the United States Constitution, which satisfy the federal question jurisdictional criteria.

b. That the original scope of the Court's jurisdiction over the present case was significantly broadened by the nature, content and legal consequences of the parties' agreements and stipulations of January 31, 1984, and March 5, 1987, stipulations which were authorized and ordered by this Court as the Consent Decrees of February 2, 1984, and March 11, 1987, respectively.

c. The Commonwealth of Puerto Rico's immunity to suit, recognized and granted by virtue of the 11th Amendment of the United States Constitution, was clearly

> and unequivocally waived in this case by virtue of the settlement agreements reached by the parties and specifically, in view of Executive Order 4234 signed by the Governor of Puerto Rico on February 1st., 1984, in direct consideration and as the central part of the parties' stipulations and agreements of January 31, 1984. The referred Executive Order embodies the entire substantive and procedural content of such agreement and the consequent consent decree of February 2, 1984. The Court decided that the acts of the Governor and the defendants in this case constituted an unequivocal waiver of the state's immunity, a waiver which is extended not only to pendent state constitutional and statutory laws but also to all federal legislation not applicable to the states without their consent.
>
> d. The Court has jurisdiction and authority to exercise its inescapable judicial review functions to supervise, enforce and determine compliance with the commitments made in the consent decrees.

The Court therefore, denied defendants' request for trial and motion submitting answer to amended complaint and furthermore, instructed the special master to:

> Meet with the parties to determine whether consensus can be reached on a Plan as mandated by the settlement agreement and, if consensus should prove to be unavailing, to report to the Court on who is responsible for

the failure of compliance, with his recommendations on how the Court should proceed.

Since defendants' motion for trial raised issues of compliance, the Court treated it as a request for a hearing as stipulated in the joint agreement and held the hearing in abeyance until "the special master fully investigates the reasons for the alleged stalemate in the negotiations for a Plan".

Defendants appealed to the First Circuit from the district court's February 26, 1988, opinion and order. In their appeal, for the first time, defendants challenged the final settlement nature of the agreements entered before the district court. On appeal, never before, they alleged that the agreements were mere arrangements to stay prosecution in lieu of final settlement negotiations.[2]

On November 17, 1988, judgment was entered in the appeals court.

The First Circuit correctly dismissed the appeal, determining that the district court's order and opinion

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[2] Plaintiffs' reserved right to reinstate the prosecution of the cause in no way should be interpreted as an option for defendants to violate their inescapable obligation to produce a plan, comprehensive in nature.

Although plaintiffs' original obligation was to stay prosecution for a year and a half, it is clear from the record that this was implicitly and expressly amended by subsequent conduct of the parties, with the approval of the court. To that effect recurrent extensions of the original one and a half year period were petitioned and obtained from the Court. But far more important, in their March 1987 amendments to the original stipulations, the parties chose to follow a different route, eliminating all possibility of any reinstatement of prosecution, should they disagree over the terms of the plan.

of February 26, 1988, is not appealable. At the same time, however, the appellate court's opinion entertained the merits of the appeal by determining that the district court had erred in construing the stipulations entered by the parties in this case as settlement agreements and, moreover, that the district court had exceeded its powers by denying defendants' request for trial. Further, the First Circuit, under the aegis of an exercise of its supervisory powers over district courts, and in realistic terms deciding the appeal on its merits, instructed the lower court to vacate its opinion and order of February 26, 1988, and grant defendant's motion for trial, advising defendants of their right to petition a writ of mandamus in the event that these instructions were not followed by the district court.

REASON FOR GRANTING THE WRIT

The First Circuit's exercise of its supervisory powers under the All Writs Act, 28 U.S.C. § 1651(a), conflicts with decisions of this Court.

This Court has repeatedly advised that "the writ of mandamus is an extraordinary remedy, to be reserved for extraordinary situations." *Gulfstream Aerospace v. Macayamas Corp.*, 485 U.S. ___ , 108 S. Ct. 1133, 1143 (1988). After its decisions in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) and *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), in which seemingly the Court "gradually, in highly uncertain ways, liberalized the standards governing the circumstances in which the issuance of mandamus by the federal courts of appeals is proper,"[3] with its 1967

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[3] Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 Harv. L. Rev. 595, 596 (1973).

decision in *Will v. United States*, 389 U.S. 90 (1967), this Court once again confined the availability of the writ along more restrictive lines.

In the present case the circuit court has expanded its supervisory powers well beyond those clearly contemplated by the Supreme Court. In so doing, it vacates an interlocutory order which, by the appellate court's own reasoning, is, at worst, erroneous, which was granted within the district court's lawful exercise of its prescribed jurisdiction, and which can be effectively reviewed by later, timely, appeal. Such gross expansion and abuse of the circuit court's recognized supervisory powers deserve this Court's attention.

The First Circuit's understanding of an "extraordinary situation amounting to a judicial usurpation of power" conflicts with this Court's as announced in *De Beers Consol. Mines Co. v. United States*, 325 U.S. 212, 217 (1945) and followed in *Will v. United States*, *supra* at 95 (reversing issuance of the writ against an order granting a bill of particulars in which a criminal defendant sought elaborate information about the witnesses to any statements made by the defendant that the government relied upon to support the charge of the indictment):

> ". . .[T]he most that can be claimed on this record is that petitioner may have erred in ruling on matters within his jurisdiction. . . . But '(t)he extraordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals.'. . .Mandamus, it must be remembered does not 'run the gauntlet of reversible errors. . . . Its office is not to 'control the

> decision of the trial court,' but rather merely to confine the lower court to the sphere of its discretionary power". *Will v. United States* at 103-104.

The circuit court's misapplies this Court's requirement that for the writ to issue "(I)t is essential that the moving party satisfy 'the burden of showing that its right to issuance of the writ is clear and indisputable' ", *Bankers Life & Cas. Co.*, 346 U.S. 379, 384 (1953), quoting *United v. Duell*, 172 U.S. 576, 582 (1899), see also, *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978), where this Court reiterated that a "district court's decision to defer proceedings because of concurrent state litigation is generally committed to the discretion of that court" and, therefore, not subject to supervisory mandamus because "[W]here a matter is committed to the discretion of a district court, it cannot be said that a litigant's right to a particular result is 'clear and indisputable'." 437 U.S. at 665-666.

The First Circuit's use of said supervisory powers when, as here, the party seeking the writ has other "adequate means to attain the relief he desires" through later appeal, is in direct conflict with principles announced and upheld by this Court in *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943).

The case at hand also conflicts with this Court's decision in *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980), where the Court reversed mandamus related to an order granting a new trial. In so doing, this Court recognized that mandamus will rarely, if ever, issue under those circumstances, where a litigant is "free to seek review of the propriety of such an order on direct appeal after a final judgment has

been entered" and, therefore, has other adequate means to obtain relief, where his right to a particular result cannot be said to be "clear and indisputable" and where, moreover, as in the case at hand, the court of appeals did not have the benefit of a complete transcript of the proceedings before the lower court and would hardly ("all but impossible") be able to hold as a matter of law that the trial court abused its discretion in entering the challenged order. 449 U.S. at 35-37, and note 3 at 36.

Moreover, in the instant case none of the elements of the *Roche* test for mandamus to issue are present—the district court clearly acted within its prescribed jurisdiction and rightfully performed its duty to interpret and enforce the court-approved agreements. On the other hand, there is here no "important issue of first impression" that needs to be decided (*Schlagenhauf* test), nor is there a recurring error of the district court that requires correction (*La Buy* test).

The circuit court has made use of the extraordinary remedy of supervisory mandamus to rescind, at an interlocutory stage of the proceedings, and without the benefit of a full record,[4] valid bilateral agreements

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[4] Without having reviewed the actions and documents presented and purported by respondents as comprehensive health plans, and, furthermore, without considering petitioners' reactions to these as submitted before the special master, the circuit court determined essential facts upon which it based the issuance of a supervisory mandamus, i.e., that there is an impasse in the negotiations, having respondents exhausted all good faith efforts to comply with the formulation of a health plan.

The district court acted fairly and prudently in its February, 1988 order instructing the master to develop the fullest possible record prior to a hearing to consider the disagreements of the

entered into by the parties before the district court. In doing so, in one sweep the court does away with four (4) years of extensive work as per court-approved orders in the development, preparation and eventual implementation of a "Comprehensive System of Health for the Mentally Retarded" in Puerto Rico, which work included the obtention of an Executive Order from the Governor of the Commonwealth of Puerto Rico, the identification of available programs, services and funds to provide medical, psychiatric and psychological services to this population, the hiring of consultants and experts by all parties involved in this litigation to work in the development of the Plan, with considerable ensuing monetary disbursements by both defendants and plaintiffs, multiple meetings and discussions with government officials, assistants to the Governor, consultants and experts, and appointment of a special master who conducted hearings and meetings and who determined that "(G)enuine progress has been made . . .toward achieving a plan to provide comprehensive services for the mentally retarded in Puerto Rico", and that "there is sufficient reliable data on which to prepare at least the initial phase of a comprehensive plan".

To sustain this intervention with the district court's inherent powers to scrutinize and supervise the agreements entered by the parties, and in a way tanta-

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parties in the negotiations. The initial consideration and determination of the existence or absence of good or bad faith by either of the parties is one for the district court to undertake in the first instance. Before this is done, any interlocutory intervention by the court of appeals, instructing the reinstatement of trial proceedings is premature and, as such, unsoundly based on an incomplete record.

mount to the eradication of the finality rule in appellate review, the circuit court reviews the district court's conclusion that the parties' 1984 agreement, together with the March, 1987 joint status report, constituted an "affirmative action" consent decree; and, siding with defendants, concludes that the district court's interpretation is incorrect and that there was no settlement agreement herein, and, therefore, no consent decree.

Relying on defendant's assertions that they have made "honest, sincere and good faith efforts in trying to carry out the [1984] agreement", and that "government officials have devoted considerable time and effort to preparing a series of plans for a comprehensive system of services to the mentally retarded", without the benefit of a full record gathered pursuant to evidentiary hearings or as per recommendations from the special master, contrary to the special master's conclusions contained in his First Report, and, therefore, simply giving credit to defendants' allegations that there is an impasse in the negotiations and that an unsurmountable disagreement between the parties has been reached, the circuit court determines that "(T)here is no finding that defendants have acted in bad faith", sees no justification for requiring them, against their will, to continue to negotiate, and concludes that the district court exceeded its powers in denying defendants' motion for a trial. The circuit court, therefore, releases defendants from whatever obligations they assumed before plaintiffs and before the district court, tosses away 4-years work, and, at this stage, substitutes its own criteria for that of the lower court and, without formally issuing a writ of

mandamus, orders it to grant defendants' motion for trial.

Supervisory mandamus does not have such broad scope or far-reaching effects. In the case at hand the district court, as ultimate guardian of the parties' stipulations, acted within its prescribed jurisdiction and exercised its inherent power to interpret, construct and enforce stipulations and agreements voluntarily entered into by the parties and judicially approved via court orders. As the circuit court points out, the "pivotal issue" herein concerns the nature of the parties' agreement, and the ensuing obligations thereunder. This, and not defendants' right to trial, is, at this point, the issue.

The main issue, therefore, centers first around an ascertainment of the facts: what did the parties agree on, what obligations did they undertake, how many agreements did they enter into, what were the precise terms of the agreement(s), and on what compliance was there, if any; and, secondly, on the interpretation of the agreements provisions, which is a matter of law.

It is undisputed that the trier of facts, or district court in this case, has full authority to construct and interpret in first place, the nature and extent of the agreements herein. The district court's views on interpretation are entitled to deference. *Brown v. Neeb*, 644 F.2d 551, 558 n.12 (6th Cir.1981) ("[f]ew persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it").

It is also true that, on direct appeal from a final decision thereto, "a court of appeals has broad au-

thority to 'modify, vacate, set aside or reverse' an order of a district court, and it may direct such further action on remand 'as may be just under the circumstances.' 28 U.S.C. § 2106 [28 U.S.C.S. § 2106]" *Allied Chemical Corp. v. Daiflon*, 449 U.S. at 34. More so here, where the interpretation of the agreements provisions, as a matter of law, is subject to plenary review on appeal. *United States v. Western Elec. Co.*, 797 F.2d 1082, 1089 (D.C.Cir. 1986), cert. denied, ___U.S. ___ , 107 S.Ct. 1384 (1987).

However, mandamus does not lie against a ruling on a question of law made by a federal district court judge merely because, according to the court of appeals' opinion, the first committed reversible error, as long as the ruling was made in the course of the exercise of the court's jurisdiction to decide issues properly before it. *Bankers Life & Cas. Co. v. Holland*, 346 U.S. at 382-383. "Although a simple showing of error may suffice to obtain a reversal on direct appeal, to issue a writ of mandamus under such circumstances 'would undermine the settled limitations upon the power of an appellate court to review interlocutory orders.' " *Allied Chemical Corp. v. Daiflon*, 449 U.S. at 35, quoting *Will v. United States*, 389 U.S. at 98, n.6.

The circuit court recognizes that the district court's order in the case at hand is not a "final decision" for appeal purposes as it does not end the case on the merits and orders no relief. By the same token, it is evident, that once the proceedings continue as directed by the district court and final judgment is entered, defendants will be able to obtain relief through ordinary appeal. As the circuit court in a contradictory fashion acknowledges, "(A)lthough the

district court's order may lead to delay and to additional litigation expense, these possibilities are 'not sufficient to set aside the finality requirement imposed by Congress. *Richardson-Merell Inc. v. Koller*, 472 U.S. 424, 436 (1985)".

Defendants herein, therefore, have adequate means, such as a direct appeal, to attain the relief they desire; and they will not be irreparably harmed through culmination of the present proceedings, and will suffer no prejudice in any way not correctable on appeal.

Moreover, at this point in the proceedings, defendants have not shown that they have a "clear and indisputable right" to unilaterally withdraw from, or rescind, the obligations voluntarily assumed by them under the stipulations or agreements herein, and request trial. Therefore, they have neither shown their "clear and indisputable right" to issuance of a writ of mandamus that provides said relief. What is definitely clear and indisputable is that defendants voluntarily entered into court-approved agreements with plaintiffs which created binding obligations irrespective of the title given to the first, be it "preliminary agreement", "stipulation", "settlement agreement", "consent decree" or "preliminary consent decree", to create a comprehensive health services system plan for the mentally retarded. That this was defendants' understanding is evidenced by four-years work and monetary disbursements pursuant thereto. Nothing in said agreements gave either party the right to unilaterally withdraw therefrom or repudiate or rescind them. On the contrary, the March 1987 amended agreement specifically provided for mechanisms (hear-

ing before the Court) to solve disagreements as to the Comprehensive Plan to be prepared.[5]

Neither party, therefore, has a "clear and indisputable right" to unilaterally withdraw from said agreements and the obligations assumed under them.

Under these circumstances, defendants' allegations of "impasse" and "unsurmountable differences" which require rescission of the court-approved agreements or stipulations must in the very least, be proven before the court.

Judicial discretion for modification of judicial decrees is limited to the most extreme circumstances where "parties are suffering hardship so extreme and unexpected as to justify saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932). The *Swift* criteria do not proscribe all modifications, but only those requested to sidestep burdensome responsibilities imposed by the decree if the proposed modifications would better effectuate the

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[5] In their March, 1987 amendments to the original stipulations, the parties chose to follow a different route other than the reinstatement of prosecution, should they disagree over the terms of the plan. To that effect, paragraph 16(E) of the 1987 joint agreement, detailing the new time tables and future actions agreed upon, clearly and expressly stated:

> "Once the parties agree on the Plan and unless, in the case of disagreement a hearing is requested before the Court, it will be presented to the Governor of the Commonwealth."

purpose of an initial decree. *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968).

Faced by modifications requests made by one of the parties to an institutional reform consent decree, judges in their interpretation of the decree, are limited "within its four corners" and not by what "might have been written had the plaintiff established his factual claims and legal theories in litigation". *United States v. Armour Co.*, 402 U.S. 673, 682 (1971); and *Firefighters Local Union No. 1784 v. Stotts*, ___U.S. ___, 104 S.Ct. 257 (1984).

Lower court's responses to petitions for modifications of institutional reform litigation consent decrees, although presenting a mix of doctrinal analyses, all concur on the petitioners' obligation to prove to the satisfaction of the court that, despite good faith efforts from their part, the expectations on which the decree provisions were based, failed to materialize.[6] See *Philadelphia Welfare Rights Organizations v. Shapp*, 602 F.2d 1114 (3rd.Cir. 1979), cert. denied, 444 U.S. 1026 (1980); *New York State Association for Retarded Children v. Carey*, 706 F.2d 956 (2d.Cir. 1983), cert. denied, 464 U.S. 915 (1983); *Brewster v. Dukakis*, 675 F.2d 1 (1st.Cir. 1982); *Cornelius v. Hogan*, 663 F.2d 330 (1st.Cir. 1981).

By means of the supervisory mandamus herein, the circuit court has in fact rescinded the court-approved agreements without the benefit of a full record and determination of the parties' compliance with the ob-

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[6] Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 Harv. L. Rev. 1020 (1986); Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*. U. Ill.L. Rev. 725 (1986).

ligations assumed before the district court, and without proven just cause on defendants' part. Even if the circuit court's understanding of the agreements herein was correct as a matter of law, under these circumstances its intervention is definitely premature and improper.

In the case at hand it is not a matter, as the circuit court says, of "encouraging parties to settle their disputes by mutual agreement" or of "denying to a party its fundamental right to a trial on the issue of liability, under the aegis of a non-existent 'consent decree'." At this point, it is simply a matter of determining whether defendants' reasons for withdrawing from obligations assumed under agreements voluntarily entered into, are true in fact, and whether they constitute just cause for withdrawal from said agreements. If said reasons are not true, or if they do not constitute just cause, under its inherent powers to enforce its own orders, the district court will have to determine what consequences, if any, the parties' conduct entail and what relief, if any, is appropriate under the circumstances.

CONCLUSION

The court of appeals' use of its supervisory powers is directly at odds with this Court's decisions confining the availability of the writ of supervisory mandamus. The circuit court's expansion and abuse of its supervisory powers pose a threat to the "final-judgment rule" and create a confusing precedent. Consideration of the matter by this Court is essential. For these reasons petitioners respectfully urge this Court to grant this petition for certiorari.

Respectfully submitted,

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June 12, 1989

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 88-1423

VICTOR RAMIREZ, ETC., ET AL.,
Plaintiffs, Appellees,

v.

JAIME RIVERA-DUENO, ETC., ET AL.,
Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO
[Hon. Raymond L. Acosta, *U.S. District Judge*]

Before
Campbell, *Chief Judge*,
Bownes and Breyer, *Circuit Judges*.

NOVEMBER 17, 1988

CAMPBELL, *Chief Judge*. For more than a decade, plaintiffs, representing mentally retarded persons, have engaged in protracted litigation and negotiation with Puerto Rico's Secretaries of Health and of Social Services over the quality of services for mentally retarded persons in Puerto Rico. At the hub of the present appeal is a court-approved agreement entered into by the two sides in 1984 in lieu of a trial that was then scheduled. The two sides take sharply contrasting views of this agreement. While the plaintiffs view it as a definitive and binding settlement of the case, the defendants view it as merely an arrange-

ment—one that has proved futile—to work *towards* a negotiated settlement. Adopting plaintiffs' view of the matter, the district court has denied defendants' present motion for a trial. We believe that the defendants' view of the 1984 agreement is more accurate, and rule that they have a right to a trial.

I. BACKGROUND

The complaint was filed in 1977 on behalf of mentally retarded persons in Puerto Rico. Although the complaint was put forth as a class action, a class was never certified.[1] The complaint, as amended most recently in 1981, alleges that the Commonwealth of Puerto Rico has failed to provide necessary residential and treatment services for mentally retarded adults, and that this failure has amounted to a deprivation of plaintiffs' civil rights. Plaintiffs seek declaratory and injunctive relief under 42 U.S.C. § 1983 (1982) and various United States constitutional provisions and statutes, as well as under the Constitution of Puerto Rico.

Between 1977 and 1983, the case proceeded before four different federal district judges, with a changing cast of attorneys. It was set for trial on September 20, 1983. Several weeks before that date, the court granted defendants a continuance in order to try to reach a preliminary agreement with plaintiffs. On December 20, 1983, in the face of delays, the district court granted the parties a final extension until January 31, 1984, "to file the preliminary agreement or be prepared to show cause why sanctions should not be imposed." On January 31, 1984,

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[1] The complaint was originally filed on behalf of both mentally retarded adults and mentally retarded children, and the defendants included Puerto Rico's Secretary of Education, as well as the Secretaries of Health and of Social Services. At present, however, the suit encompasses the complaints only of mentally retarded adults, and educational services are no longer at issue.

the parties filed a joint motion reporting the following agreement ("the 1984 agreement"):

> 1. The parties agree that plaintiffs will paralize [sic] the prosecution of this suit for the period of a year and a half from the date of filing of this Motion if the terms and conditions of the Executive Order, included as Exhibit A of this motion, are met.
>
> 2. The parties will file a joint status report every six months . . . . Said report shall include the status of compliance with the terms and conditions of the Executive Order . . . .

The district court approved the agreement on February 2, 1984.

In the executive order referred to in the agreement, the Governor of Puerto Rico ordered that all existing services for the mentally retarded be consolidated within the Department of Health. After this consolidation the Department of Health was to "formulate a comprehensive health services system for said population incorporating the existing services and those newly created which are necessary . . . ." The plan for the services was to be prepared within a year and a half, and then "must be available for the consideration and approval of the Governor."

In the two years that followed the agreement, defendants submitted to plaintiffs several versions of a plan for services for the mentally retarded, but plaintiffs rejected these plans as inadequate. In March 1986, plaintiffs requested the court's permission to resume the prosecution of the case "since the terms of the Stipulation between the parties have not been complied with." The district court apparently never ruled on this motion. Instead, further negotiations commenced between the parties. In a joint status report, submitted to the court on March 5, 1987, the parties concluded that a comprehensive

plan was "still necessary," and they outlined a new timetable for the development of a plan.

Even after this renewed effort, the parties proved unable to move toward a mutually acceptable solution. On August 17, 1987—more than ten years after the inception of the suit—the district court appointed a special master, citing "the need to constantly and effectively monitor the activities of the defendants in their compliance with their obligations under the Court's Order dated December 20, 1983." (The December 20, 1983 order was the one that directed the parties, upon penalty of sanctions, to file their preliminary agreement with the court.) Defendants' motion to vacate the order appointing the special master was denied. On September 21, 1987, defendants proposed a new two-year plan, accompanied by a proposed new executive order of the Governor. The district court referred this proposal to the special master. According to defendants, two days prior to the scheduled hearing before the special master, plaintiffs' attorney informed defendants that this new plan, like the previous ones, was unacceptable to plaintiffs.

On December 15, 1987, defendants filed the motion that is the focus of the present appeal. Claiming that the parties had reached an impasse, defendants stated that they were withdrawing from any further negotiations and requested that the long-delayed trial be rescheduled. Shortly afterward, on December 30, defendants submitted an answer to plaintiffs' six-year-old amended complaint.

On February 26, 1988, the district court issued an opinion and order responding to defendants' request for a trial. After reviewing the history of the case, the district court concluded that the January 31, 1984 agreement was in fact a settlement agreement—transformed by court approval on February 2, 1984, into a consent decree—in which both parties had permanently surrendered their right to a trial. Accordingly, the court denied defendants' request

for a trial, as well as their motion submitting an answer to the amended complaint. The court ruled that it had "jurisdiction to enforce the settlement agreement of January 31, 1984, as amended by the Joint Agreement [the joint status report] of March 5, 1987." To this end, the court instructed the special master to "meet with the parties to determine whether consensus can be reached on a Plan as mandated by the settlement agreement and, if consensus should prove to be unavailing, to report to the Court on who is responsible for the failure of compliance, with his recommendations on how the Court should proceed."

II. WAS THE 1984 AGREEMENT A SETTLEMENT AGREEMENT?

The pivotal issue in this appeal is whether the January 1984, agreement was, in fact, a "settlement agreement" that obviated the need for plaintiffs to prove at trial that defendants had violated their constitutional or other federally protected rights and, for that reason, owed the plaintiffs redress. If it was such a settlement agreement—transformed by court approval into a consent decree—then the district court would have been within its power to deny defendants a trial and instead to press for compliance with the agreement. If, on the other hand, the 1984 agreement was merely an arrangement to work toward a mutually acceptable agreement—as defendants insist—then the district court exceeded its authority when it refused to grant defendants a trial, since defendants cannot be required to adhere to the court's remedies without first having been found to have violated the law. Thus, we now consider the nature of the 1984 agreement. We postpone until afterward discussion of whether the district court's order is appealable or otherwise reviewable by this court.

In the district court's view of the critical events, "[t]hrough the process of negotiation the parties reached a settlement agreement on January 31, 1984, consisting

of the terms of Executive Order 4234, signed by the Governor on February 1, 1984, and approved by the Court the following day." As the district court saw it, the agreement was one in which the parties gave up their respective claims and defenses, and subjected themselves to the district court's supervisory authority. The district court likened the 1984 agreement, together with the March 1987 joint status report, to an "affirmative action" consent decree:

> Typically, a settlement agreement avoids admissions of responsibility and culpability with reference to the claims set forth in the complaint. Rather the parties agree to focus on affirmative action, foregoing their respective claims and defenses. That is what took place in this case. The complaint contained a number of alleged violations of constitutional and statutory rights. Defendants were entitled to put their defenses to the test of a trial, as were plaintiffs with respect to their claims. Both parties chose an alternative course: not to litigate through trial, but rather to reach settlement on the basis of a joint agreement under the aegis of the Court. The Joint Agreements, both on January 31, 1984 and on March 5, 1987, in effect substituted for the claims and defenses of the parties' complaint and answer a course of affirmative action which both parties implicitly recognized was remedial in nature. The Court's stamp of approval made it the ultimate guardian of the settlement agreement's enforcement. *See Local No. 93* v. *City of Cleveland*, 106 S. Ct. 3063, 3075-76 (1986).

As already noted, defendants take a very different view of the 1984 agreement, regarding it as merely an arrangement to suspend litigation, in an effort to move toward a mutually acceptable agreement. In defendants' view, the agreement did not renounce any defenses on the issue of

liability. Rather, it entailed only a promise by plaintiffs to "paralize [sic] the prosecution of this suit for a period of a year and a half . . . if the terms and conditions of the Executive Order . . . are met."

After reviewing the terms of the 1984 agreement, in the context of the history of this litigation, we conclude that the defendants' interpretation is correct. As the Supreme Court observed in the "affirmative action" case that the district court cited in its opinion and order, "it is the agreement of the parties . . . that creates the obligations embodied in a consent decree." *Local No. 93, International Association of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 522 (1986). The text of the 1984 agreement makes apparent that defendants did not renounce for all time their basic right to litigate the question of their own liability in favor of a judicially supervised settlement. Instead, the parties merely arranged to suspend the litigation in the *hope* of arriving at a settlement. Moreover, the executive order of the Governor, included as Exhibit A of the 1984 agreement, makes no reference to the litigation. The executive order seems most appropriately viewed as a statement of the Governor's policy to develop a comprehensive plan for services to the mentally retarded, rather than as a commitment made specifically to the plaintiffs.

If the matter were not apparent enough from the text of the 1984 agreement, the conclusion that it was *not* a settlement agreement is buttressed by the fact that the parties themselves did not refer to their agreement as a "settlement agreement" or "consent decree." In the December 20, 1983 order—which the district court later cited as justifying its appointment of a special master—the court ordered the parties to file a "preliminary agreement," not a settlement agreement. In the March 1987 joint status report—viewed by the district court as an amendment of the "settlement agreement"—the terms "settlement agreement" and "consent decree" were not used. As far as we

can tell from the record, the first time either the court or any party referred to the 1984 agreement as a "settlement agreement" or "consent decree" was in plaintiffs' motion of January 15, 1988, opposing defendants' request for a trial.[2] Moreover, the district court's view that in the 1984 agreement both parties renounced their right to a trial is hardly consistent with *plaintiffs'* motion of March 1986, "to start again the prosecution of this case since the terms of the Stipulation between the parties have not been complied with."

Nor does anything in the joint status report of March 1987 serve to convert the 1984 agreement into a settlement agreement or consent decree. The March 1987 joint status report noted that through the 1984 agreement "the parties stayed prosecution of the present action pending defendant's compliance with the terms and conditions of [the] Executive Order." After reviewing the events since January 1984, the parties agreed that "A Plan for the creation of a 'Comprehensive System of Health for the Mentally Retarded' is still necessary," and defendants agreed to undertake a new set of efforts to develop such a plan. The joint status report added:

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[2] Plaintiffs have not directed our attention to any instances in which anyone referred to the 1984 agreement as a "settlement agreement" or "consent decree" prior to their January 1988 motion. In fairness to the district court, we note that our own review of the record reveals several previous allusions to a "settlement agreement" or "consent decree." Before the 1984 agreement was entered into, defendants filed at least two motions for continuance in which they referred to their *aim* of reaching a "settlement" or "settlement agreement." And after the 1984 agreement, in defendants' December 1987 motion for a trial, defendants cited the "consent decree" in the case of *Lelsz* v. *Kavanagh*, 807 F.2d 1243 (5th Cir. 1987), in a context that seemed to liken the agreement in *Lelsz* to the one in the present case. But none of these scattered references directly characterizes the 1984 agreement as a "settlement agreement" or "consent decree." These references certainly do not outweigh the clear evidence provided by the text of the 1984 agreement itself that it was *not* a settlement agreement.

> Once the parties agree on the Plan and unless, in the case of disagreement a hearing is requested before the Court, it will be presented to the Governor of the Commonwealth of Puerto Rico for his consideration and approval and, thereafter, submitted to this Court.

As we read the joint status report, it reiterated the parties' intention to work toward a settlement, implicitly extending their agreement to suspend litigation. But nothing in the joint status report stated or implied that the parties had entered into (or were then entering into) a settlement agreement, or that either party was renouncing its claims, defenses, or right to a trial.

Settlement agreements are, of course, possible in the context of controversies about a state's services for the mentally retarded. When embodied in court-approved consent decrees, such agreements are enforceable by the district court. *See, e.g., Brewster* v. *Dukakis*, 675 F.2d 1 (1st Cir. 1982) (consent decree resulting from a negotiated settlement of a class action suit by mentally disabled persons against the Commonwealth of Massachusetts). But given the major consequences of such a settlement agreement or consent decree, one would expect its character as such—including the willingness of defendants to forego their right to trial—to be far clearer than what is now before us.

We conclude, therefore, that there was, in fact, no settlement agreement between the parties and, therefore, no consent decree. Defendants, moreover, have engaged in negotiations and come forward with various plans and proposals in the four years since the January 31, 1984 order. In now requesting a trial, defendants assert that they have made "honest, sincere and good faith efforts in trying to carry out the [1984] agreement." They state that government officials have devoted considerable time and effort to preparing a series of plans for a comprehensive system of services to the mentally retarded. There is no finding

that defendants have acted in bad faith. Under these circumstances, we can see no justification for requiring defendants, against their will, to continue to negotiate, given especially the fact that at no time has it been established that the Commonwealth is legally liable. Therefore, defendants' motion for a trial should be granted.

III. THE REVIEWABILITY OF THE DISTRICT COURT'S ORDER

We turn now to what is, logically, the initial inquiry—whether this court has jurisdiction at present to review the district court's order denying defendants' request for a trial and instructing the special master to continue meeting with the parties. Defendants contend that the order was appealable to the court of appeals either as a final judgment (under 28 U.S.C. § 1291 (1982)) or as an injunction (under 28 U.S.C. § 1292(a)(1) (1982)). Alternatively, they suggest that we are authorized to treat their appeal as a petition for a writ of mandamus (under the All Writs Act, 28 U.S.C. § 1651(a) (1982)). We consider in turn each of these possibilities.

28 U.S.C. § 1291 provides for appellate review of "final decisions" of the district courts. The Supreme Court has stated that "as a general rule a district court's decision is appealable under this section only when the decision 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 108 S. Ct. 1133, 1136 (1988) (quoting *Catlin* v. *United States*, 324 U.S. 229, 233 (1945)). *See also Massachusetts Association for Retarded Citizens* v. *King*, 643 F.2d 899, 904 n.12 (1st Cir. 1981). It is hard to see how the district court's challenged order "ends the litigation on the merits." To the contrary, the order ensures that proceedings before the court will continue. Even if the district court's opinion and order is viewed as a final decision terminating *litigation*, it does not end the case "on the merits" because no relief has

yet been ordered. *Cf. Garzaro* v. *University of Puerto Rico*, 575 F.2d 335, 337 (1st Cir. 1978) (order finding defendants liable in a civil rights action but leaving open the issue of monetary damages is not appealable as a final order); *De Fuertes* v. *Drexel, Burnham, Lambert, Inc.*, 855 F.2d 10 (1st Cir. 1988) (order compelling arbitration, but retaining jurisdiction, is not a final judgment). Although the district court's order may lead to delay and to additional litigation expense, these possibilities are "not sufficient to set aside the finality requirement imposed by Congress." *Richardson-Merrell Inc.* v. *Koller*, 472 U.S. 424, 436 (1985).

Neither does the district court's order qualify as the sort of "collateral order" in an ongoing case that is appealable as an exception to the final judgment rule under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and subsequent cases. To qualify for the collateral order exception, an order must, among other things, be "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). In this case, the district court's order would ultimately be reviewable on appeal from a final judgment in which relief was ordered.

Defendants argue that the district court's order may also be viewed as an injunction, inasmuch as it in effect orders defendants to continue meeting, against their will, with the special master. The order also directs that "if consensus should prove to be unavailing" the special master shall "report to the Court on who is responsible for the failure of compliance, with his recommendations on how the Court should proceed." Defendants view this portion of the order as raising the specter of sanctions against them. If the district court's order were in fact an injunction, it would be appealable under 28 U.S.C. § 1292(a)(1).

We do not fail to perceive the injunctive aspects of the district court's order. *Cf. Robbins* v. *George W. Prescott Publishing Co.*, 614 F.2d 3, 5 (1st Cir. 1980) (noting that

a district court's refusal to stay an order requiring arbitration may be analogous to an injunction, and thus appealable under 28 U.S.C. § 1292(a)(1)). Nevertheless, we do not think that the district court's order in the present case is an appealable injunction. As a general rule, "[a]n order by a federal court that relates only to the conduct or progress of the litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)." *Gulfstream*, 108 S. Ct. at 1138 (citations omitted). In particular, orders directing parties to prepare, submit, or participate in formulating plans—for example, in school desegregation litigation—have not generally been held to be appealable injunctions. *See, e.g., Taylor* v. *Board of Education*, 288 F.2d 600, 604 (2d Cir. 1961). *See generally* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3922 (1977 & 1988 Supp.). Moreover, the district court's order does not directly order defendants to do anything. Instead, the order is directed at the *special master*, who is instructed to meet with the parties and "determine whether consensus can be reached." Such an order to a master is hard to view as injunction. *Cf. Teamsters Local Unions* v. *Braswell Motor Freight Lines, Inc.*, 428 F.2d 1371, 1373 (5th Cir. 1970) (order referring question of damages to a master is not an appealable injunction). *cert. denied*, 401 U.S. 937 (1971). There may well be some truth to defendants' view that the order was "in effect an injunction [intended] to force them to negotiate a settlement against their expressed will." Still, the order on its face is not clearly injunctive.

While the district court's order is, therefore, not appealable, we exercise our discretion to treat defendants' appeal as a petition for mandamus under the All Writs Act, 28 U.S.C. § 1651(a). *See United States* v. *Sorren*, 605 F.2d 1211, 1215 (1st Cir. 1979). The Supreme Court has recently reiterated that "the writ of mandamus is an extraordinary remedy, to be reserved for extraordinary situations." *Gulf-*

stream, 108 S. Ct. at 1143 (citations omitted). Thus, we do not readily utilize the writ of mandamus as a means of correcting a district court's unappealable orders. Instead, we restrict our use of the writ to "exceptional circumstances amounting to a judicial 'usurpation of power.' " *Will* v. *United States*, 389 U.S. 90, 95 (1967) (quoting *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212, 217 (1945)). *See also United States* v. *Sorren*, 605 F.2d at 1215 (mandamus appropriate only when the lower court is clearly without jurisdiction). The party seeking mandamus has the burden of showing that it has a clear and indisputable right to issuance of the writ. *Gulfstream*, 108 S. Ct. at 1143. Finally, we will not issue a writ of mandamus without a showing that interlocutory relief is necessary to prevent irreparable harm. *In re Justices of the Supreme Court of Puerto Rico*, 695 F.2d 17, 20 (1st Cir. 1982).

We conclude that this case presents one of those "extraordinary situations" that calls for the issuance of a writ of mandamus. In denying defendants' motion for a trial, the district court has exceeded its powers. To be sure, encouraging parties to settle their disputes by mutual agreement is a proper and often valuable part of the work of the district courts. And the district courts are obliged to enforce consent decrees, once they have been appropriately entered. But it is beyond a court's power to deny to a party its fundamental right to a trial on the issue of liability, under the aegis of a non-existent "consent decree."

The district court's denial of a trial to defendants causes "harm [that] goes far beyond the mere burden and expense of protracted litigation." *In re Perry*, No. 88-1475, slip. op. at 8 (1st Cir. Oct. 19, 1988). The parties are officials of the Commonwealth of Puerto Rico and persons representing a disabled group of citizens. Under the district court's opinion and order, defendants may be obliged to continue "negotiating" for years, even though every in-

dication is that the negotiations are stalemated. The likely result would be a continuing state of hostility and uncertainty. Such a state of affairs would hobble the Commonwealth agencies and officials charged with responsibility for services to mentally retarded persons. And such a state of affairs would hardly be a boon to Puerto Rico's mentally retarded men and women themselves. As in another case in which we granted a writ of mandamus, the district court's order "ha[s] come to assume such importance in this case that justice requires us to deal with [it] now rather than later." *In re Puerto Rico Electric Power Authority*, 687 F.2d 501, 506 (1st Cir. 1982).

The district court should vacate the opinion and order of February 26, 1988, and grant defendants' motion for a trial. In so ruling, we express no opinion about the validity of plaintiffs' various constitutional and statutory claims, or about the validity of defendants' claimed defense of sovereign immunity under the Eleventh Amendment.

As in other cases in which we have exercised our supervisory powers over district courts, we are confident that the district court will comply with this opinion and therefore we need not formally issue a writ of mandamus. *See In re Certain Special Counsel to the Boston & Maine Corp.*, 737 F.2d 115, 120 (1st Cir. 1984); *In re Berkan*, 648 F.2d 1386, 1390-91 (1st Cir. 1981); *In re United States*, 348 F.2d 624, 626 (1st Cir. 1965). In the unlikely event that this opinion is not complied with, defendants may petition for a writ of mandamus, in conformity with the procedures of Federal Rule of Appellate Procedure 21.

So ordered.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 77-0577 (RLA)
CIVIL NO. 77-1178 (RLA)

VICTOR RAMIREZ, et al.,

Plaintiffs,

v.

JAIME RIVERA DUEÑO, et al.,

Defendants.

OPINION AND ORDER

In the period December 14, 1987 through January 15, 1988 the parties have filed motions which require determination by the Court of the legal status of the case. Prior to responding to the respective motions of the parties, a summary of the case's history is in order. Since the record encompasses 14 pages of docket proceedings, only those matters of direct relevance to the issues raised by the parties since December 14, 1987 will be considered.

HISTORY OF THE CASE

1. The initial complaint was filed on April 19 and, in amended form, on August 31, 1977. It requested declaratory and injunctive relief against Jaime Rivera Dueño, Genaro Collazo Collazo and Carlos E. Chardón, respectively Secretaries of Health, Social Service, and Education of the Commonwealth of Puerto Rico, individually and in their official capacities. The jurisdiction of the Court was set forth as follows:

1. This class suit is a civil rights action arising under 42 U.S.C. § 1983; 5th., 8th. and 14th. Amendments of the United States Constitution; Art. 2 § 5, Constitution of the Commonwealth of Puerto Rico; 42 U.S.C. § 6010; (§ 201 of the Developmentally Disabled Assistance and Bill of Rights Act.); 29 U.S.C. § 794 (§ 504 of the Rehabilitation Act of 1973). Jurisdiction is authorized by 28 U.S.C. § 1343 (3). Plaintiffs also request declaratory and injunctive relief pursuant to 28 U.S.C. § 1651, 2201 and 2202, 42 U.S.C. § 1983, and Rule 57 of the Federal Rules of Civil Procedure.

and the nature of the action in these terms:

2. This action challenges the systematic deprivation of the civil rights of individuals, juveniles and adults who are mentally retarded or function at any level of mental retardation. The deprivation of the rights of this class of persons results from Defendants' failure to provide appropriate mental retardation services and adequate special education to class members. The Defendants' actions and refusals to act have occurred and are occurring under color of law.

3. Class members are being denied access to public education available to school age persons in the Commonwealth of Puerto Rico. Further, class members are denied the care, custody, habilitation and treatment services urgently needed by them. Although defendants agree that these individuals need mental retardation services and special education, all claim they cannot provide the needed services.

4. Some class members have been placed in psychiatric hospitals and juvenile institutions,

> none of which provide services for mentally retarded individuals. The emotional problems and subsequent deterioration of these individuals have worsen considerably as a result.
>
> 5. This action seeks declaratory and injunctive relief to prevent the continued refusal by the Defendants to provide mental retardation services and special education to class members. It seeks an order that the Defendants must identify who is responsible for providing appropriate mental retardation services and special education to these individuals, and that the Defendants must start providing such appropriate services.

Defendants answered the initial and amended complaint on June 28 and November 28, 1977, respectively.

2. The Court's jurisdiction to hear this case was challenged on two prior occasions; in both the decision rejected the jurisdictional claims of the defendants. See Decision and Order of the Court, October 10, 1978 and December 20, 1979. The decisions of the Court were based on the case law governing in that period.

3. On December 21, 1981 plaintiffs requested leave of the Court to file an amended complaint, which was granted on February 19, 1982. It was not until December 30, 1987 that defendants filed a motion submitting an answer to the amended complaint, to which the plaintiffs filed a motion in opposition on January 15, 1988. The Court will rule on the latter motions later in this opinion.

4. Prior to the setting of a date for trial, the parties informed the Court on October 19, 1983 that a preliminary agreement was on the point of being reached and that it would include an Executive Order by the Governor. On November 25, 1983 defendants filed the following motion:

> 1. On October 17, 1983 this Honorable Court issued an Order granting thirty (30) days to the

parties in this action to file a preliminary agreement.

2. The parties requested thirty (30) days in order to provide time for the necessary administrative procedures in order to have the Governor of Puerto Rico sign the Executive Order.

3. The undersigned was informed by the Assistant Secretary of Justice in charge of the Litigation Division of the Department of Justice, José J. Torres Escalera, that he met on November 22, 1983 with the Governor's aides, and that he was informed that at least fifteen (15) more days were needed in order to procure the signature of the Governor of Puerto Rico.

4. That the undersigned attorney spoke to Ana Matanzo, Esq., Counsel for Plaintiffs, to discuss this request for additional time, and she agreed to the same.

which was granted by the Court on December 5, 1983.

On December 20, 1983 the Court recapitulated what had transpired until that date:

ORDER

On October 19, 1983, this Court issued an Order granting the parties a term of thirty (30) days to file a preliminary stipulation with an attached Executive Order to be signed by the Governor and a timetable for the various steps to be taken in accordance with the said Executive Order. On November 25, 1983, the defendants filed a motion requesting that the Court grant the parties until December 10, 1983 to file the preliminary agreement. To date, the agreement has not been filed.

and concluded:

> ...the parties are granted until January 31, 1984 to file the preliminary agreement or be prepared to show cause why sanctions should not be imposed.

On January 31, 1984 the parties filed a joint motion summarizing the arrangement they had reached:

> 1. The parties agree that plaintiffs will paralize the prosecution of this suit for the period of a year and a half from the date of filing of this Motion if the terms and conditions of the Executive Order, included as Exhibit A of this motion, are met.
>
> 2. The parties will file a joint status report every six months, beginning on the file date of the filing of this motion. Said report shall include the status of compliance with the terms and conditions of the Executive Order, which is included as Exhibit A of this motion.

which the Court approved on February 2, 1984, subject to the condition that "the parties shall file a joint status report every 6 months commencing on August 1, 1984."

5. Executive Order 4234, which the Court approved as an integral part of the agreement between the parties, was signed by the Governor on February 1, 1984. The Governor's Executive Order sets forth the problems of providing services for the mentally retarded population, commits the government to a plan of remedial action and fixes time limits for compliance:

EXECUTIVE ORDER FROM THE GOVERNOR OF THE COMMONWEALTH OF PUERTO RICO

TO FIX UPON THE MENTAL HEALTH AUXILIARY SECRETARY OF THE DEPARTMENT OF HEALTH OF THE COMMONWEALTH OF PUERTO

RICO THE RESPONSIBILITY OF PROVIDING THE COMPREHENSIVE MENTAL HEALTH SERVICES NECESSARY TO THE MINOR AND ADULT POPULATION WITH SOME TYPE OF MENTAL RETARDATION:

WHEREAS: A mentally retarded is a person who has a mental condition which occurs in the development phase, making it to function at a level below the intellectual average of the other persons, there being 4 classes which are: slight, moderate, severe and deep retardation.

WHEREAS: Among others, the Department of Health, Social Services Department, and the Public Education Department receive funds, state as well as federal, to work with the mental retardation problem in Puerto Rico; among these funds there are some that are identified as funds to provide medical, psychiatric and psychological services to this population.

WHEREAS: It is necessary to identify the programs, services and funds referred to in the previous Whereas and once identified, to proceed to develop a plan to unite all of these services, programs and funds.

WHEREAS: The Department of Health will be the agency responsible to evaluate, diagnose and provide medical-psychiatric and/or psychological services to the population suffering of mental retardation; minors as well as adults of the Commonwealth of Puerto Rico;

The responsibility for the education of this population is fixed upon the Public Education Department of the Commonwealth of Puerto Rico.

WHEREAS: Legislative endeavours must be carried out for the next ordinary Legislative Assembly to order all concerned agencies to transfer to the Department of Health all budget, personnel, equipment and responsibilities they have in relation to the mentally retarded, except the budget, personnel and equipments directly related to the special education of this population. Legislation must include the budget that is necessary for these purposes.

THEREFORE: I, CARLOS ROMERO BARCELO, Governor of the Commonwealth of Puerto Rico, pursuant to the authority granted by law, herewith order the unification under the Department of Health of all existing services for the minor and adult population with some type of mental retardation, said unification is done with the purpose of once the existing services are identified and united, the Department of Health will formulate a comprehensive health services system for said population incorporating the existing services and those newly created which are necessary and that, besides to gather all and each one of the topics mentioned in all the Whereas of this Executive Order.

THEREFORE: The identification of programs, services and funds must be done in a period not greater than 6 months since the date of this Executive Order. Once the programs services or funds have been identified, the mental Health Auxiliary Secretary of the Department of Health will have one year to elaborate the plan to unify these services and develop the services system; at the end of said year, the plan must be available for the consideration and approval by the Governor. Once said plan and the services system is approved, they must be developed and implemented in a period not greater than 10 years. (Official translation by defendants.)

6. On March 5, 1987 the parties filed a joint status report and leave for amendments to their agreement of January 31, 1984, which the Court approved on March 11, 1987. The joint status report restated the terms of the Executive Order 4234, noting that the Court had granted several extensions to file a revised "Comprehensive Mental Health Services System Plan," listed the documents and plan prepared by the defendants, all of which were found wanting by plaintiffs, took note that by joint agreement the Secretary of Health had by Administrative Order created in November of 1986 an administrative unit to produce procedures and substantive standards to implement the Plan once it had been bilaterally agreed on, and after two years of effort and discussion both parties concluded:

a- A Plan for the creation of a "Comprehensive System of Health for the Mentally Retarded" is still necessary.

b- The identification of the programs, services and funds by which the various components of the Commonwealth Government's Executive Branch provide medical, psychiatric and psychological services to mentally retarded adults and minors has to be expanded and updated.

c- Follow up is required on legislation which would order the transfer to the Department of Health of all budget, personnel, equipment and responsibilities related to the provision of services to the mentally retarded, with the exception of those services provided by the Department of Education which would remain this latter agency's responsibility.

To move toward the preparation of a Plan for the creation of "Comprehensive System of Health for the Mentally Retarded acceptable to both parties, the Department of Health agreed to contract the services of an independent consultant who, in collaboration with a specifically designated group of public employee professionals would constitute the "planning team." A proposed by the parties, and approved by the Court:

(B) Once the Plan is approved by all parties, it will be made available to the Governor for his consideration and approval. After its approval the plan will be jointly submitted to this Court.

(C) Once presented to the Court, the Department of Health's Assistant Secretary for Mental Health, Dr. Efrén Ramírez, and, thereafter, anybody duly designated to succeed him in said position, shall head a Committee or Task Force which will be responsible for implementing or putting the Plan into effect and making it fully operational by February 1, 1993.

The timetable, proposed by the parties, and approved by the Court for Plan preparation, approval and submission to the Court, provided:

> (A) The consultant will be contracted and commence work within one month from the signing of this Status Report or, in other words by April 2, 1987.
>
> (B) The consultant will complete the proposed Plan, a copy of which shall be provided to Plaintiffs upon completion for examination within, two months of having been contracted, or in other words by June 2, 1987.
>
> (C) Plaintiffs will review the proposed Plan, exchange comments and suggest modifications to the Plan or request a Court hearing within thirty days after its receipt.
>
> (D) Defendants will review and modify Plan, if necessary, within thirty days after commentaries are submitted by plaintiffs.
>
> (E) Once the parties agree on the Plan, and unless, in the case of disagreement a hearing is requested before the Court, it will be presented to the Governor of the Commonwealth of Puerto Rico for his consideration and approval and, thereafter, submitted to this Court.

7. The June 2 deadline for the proposed Plan was not met and the Court ordered it to be filed "in its final form" no later than August 17, 1987. The minutes of the July 20, 1987 status conference state:

> Parties met with the Court for an in-chambers Status Conference.
>
> Defendants to submit plan by August 17, 1987. Plaintiffs to submit on same day, a memorandum re: identifying the class for purposes of utilizing

this group as a "sample" or "pilot" group for the implementation of the "plan".

A status conference to be set up for late September to discuss implementation.

8. In the August 17, 1987 status conference Dr. Navarro's "conceptual report" was not ready, but defendants pledged that it would be available to the Court and plaintiffs within a few days. The final Plan, including operational implementation and budgetary resources was ordered to be filed by September 17. At the August 17 status conference the Court announced the appointment of Dr. David M. Helfeld as Special Master in this case which was officially notified to the parties the following day in a seven-page Order. The Court's reasons are set forth at the outset of the Order:

This action was filed on April 19, 1977.

Due to the exceptional condition of this case involving the need to constantly and effectively monitor the activities of the defendants in their compliance with their obligations under the Court's Order dated December 20, 1983 (hereinafter "Orders") which have been hitherto unavailing without justification and to eliminate the likelihood of continued failures to meet the obligations which have resulted in unnecessary delays in the preparation and implementation of a plan or system for the care, treatment, and custody of the mentally retarded of this Commonwealth, the Court hereby determines that it is necessary that a special master be appointed pursuant to Rule 53 of the Federal Rules of Civil Procedure.

9. Dr. Navarro's conceptual report, entitled "Planning Document For the Elaboration of a Plan For a Compre-

hensive System of Services For Mentally Retarded Persons in Puerto Rico," was filed on August 21, 1987.

10. On September 21, 1987 defendants filed a document entitled "Plan for Servicing the Population With Mental Retardation: Fiscal Years 1987-88; 1988-89," which was accompanied by proposed new Executive Order of the Governor. Defendants' reasons for submitting a two-year plan were:

> We are hereby submitting to plaintiffs said plan for 1987 up to 1989 as a feasible alternative to ensure services to the population with mental retardation while the remaining plan which will be fully operational by 1993 is designed by the Administrative Unit created for that purpose but which has been hampered, among other things, by a lack of an Executive Order which really established the mecanisms with the force of law to allow the comprehensive service delivery system to take shape as stated in pages 25 to 26 of Dr. Ana Navarro's report.
>
> The proposed Executive Order which substitutes Executive Order No. 4234 which has been elaborated and discussed with the assistants to Governor Hernández Colón, Mr. Oscar Rodríguez and Attorney Berrocal establishes inequivocally the duties of each defendant agency and the Administrative Unit in the formulation of the rest of the plan. The mandates of the new executive order meets most of the criticisms which plaintiffs indicated in their reaction to the first Comprehensive Plans. A centralized information system is mandated as a sine qua non requisite for the elaboration of the rest of the plan.

and concluded: "Defendants respectfully request this Honorable Court to accept the foregoing document and alternatives for submitting the plan for the remaining years

as a feasible alternative to comply with the Joint Status Agreement."

11. A hearing was called by the Special Master for December 16, 1987 to clarify and review the documents described in paragraphs 9 and 10, *supra*, and to consider the report of plaintiffs' experts, Drs. Mayra Huergo and Julio Fonseca, entitled "Reactions to the Proposed Plan for Servicing the Population With Mental Retardation." On the morning of December 16, prior to beginning the hearing, defendants presented the Master with a copy of their motion to the Court, filed on December 14, "In Request of Continuance of Hearing Set by Master for December 16, 1987," the request being based on their motion of December 15 "Regarding Current Status of the Case and Request for Trial." The Special Master conducted the hearing, as scheduled, and a summary of the hearing proceedings has been submitted to the Court and to the parties.

12. On December 18, 1987 defendants filed a motion requesting the Court "to stay the intervention of the Special Master in the present case until the Motion filed on December 15, 1987 in request of a trial date is resolved by this Honorable Court." On December 29 the plaintiffs, by motion, requested the Court to deny defendants' petition for the stay of the Special Master's intervention. On December 30, 1987 the Court denied defendants' motion: "The Special Master shall continue his functions until the Court rules upon defendants' motion regarding current status of the case and request for trial, as amended."

13. The December 15, 1987 motion, as amended on December 17 "Regarding Current Status of the Case and Request for Trial," set out the defendants' summary of the case's history, including the terms of Executive Order 4234, the plans and documents submitted to and rejected by plaintiffs, the Joint Status Report and Leave for Amendments to Agreement submitted by the parties to

the Court on March 5, 1987. Among other allegations the motion asserts:

> The trial was scheduled for September 20, 1983, but due to the possibility of an agreement between the parties, said trial date was continued and a status conference was held on October 19, 1983.
>
> Although defendants have always denied liability and have questioned Court's lack of jurisdiction, they have attempted to resolve this case in good faith through a process of negotiation. Because of this, at said status conference an agreement was reached based on the proposed improvements to the health services provided by the Commonwealth of Puerto Rico. The parties proposed and the Court agreed to paralize the prosecution of the suit if the terms and conditions of Executive Order #4234 of February 1, 1984 signed by then Governor Carlos Romero Barceló were met.

The motion also states: "Much to our surprise and opposition a Master was named by this Court on the date of the presentation of the 4th plan by defendants." It concludes that "there is clear and unsurmountable disagreement between the parties as to *all the plans submitted by the defendants*," despite the "honest, sincere and good faith efforts" which have been made to carry out the terms of the agreement between the parties and, in view of the stalemate in negotiations, requests the Court "to set aside the paralization of the proceedings in this case and set a trial date."

In the same motion defendants raise the question of whether the Court has jurisdiction in this case, citing the following cases: *Lelsz v. Kavanagh*, 807 F.2d 1243 (5th Cir. 1987); *Society for Goodwill to Retarded Children v. Cuomo*, 737 F.2d 1239 (2nd Cir. 1984); *Youngberg v. Ro-*

meo, 457 U.S. 307 (1982); *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981) and 465 U.S. 89 (1984) (*Pennhurst* I and II); *Ingraham v. Wright*, 430 U.S. 651 (1977).

14. On December 30, 1987 defendants filed a motion submitting an answer to the plaintiffs' amended complaint of December 21, 1981:

> Come now defendants in the above captioned case and respectfully aver and pray:
>
> 1. That the proceedings in the above case had been paralized pursuant to an agreement to negotiate.
>
> 2. That defendants have submitted a Motion requesting a trial date and informing this Honorable Court that it is withdrawing from the negotiations due to unsurmountable differences with plaintiffs' attorneys.
>
> WHEREFORE, defendants respectfully submit the Answer to the Amended Complaint in furtherance of the proceedings in the instant case.

The answer itself consists of 5 general answers, specific responses to all 59 averments of the amended complaint and 18 affirmative defenses.

15. On January 15, 1988 plaintiffs filed a motion in opposition to the answer to the amended complaint on the ground of untimeliness and the fact that it conflicts with the defendants' obligations under the joint agreement of the parties adopted four years earlier and ordered by the Court.

16. Plaintiffs' motion in reply to defendants' motion regarding current status of the case and request for trial consists of the following elements: a summary of the history and current status of the case, the reasons for their opposition to defendants' request for trial, principally based on the obligations of the parties under the terms of the

settlement agreement, the federal question claims raised in the complaint, their interpretation of the relevance of essentially the same cases cited by the defendants and considerations of sound judicial administration. Plaintiffs conclude urging the Court to deny defendants' request for trial and to order defendants to comply with the terms of the settlement agreement, as amended, and the Court's orders.

MOTION SUBMITTING ANSWER TO THE AMENDED COMPLAINT

17. Properly phrased the motion should have requested leave of the Court to answer, first because of the time which had elapsed since the filing of the amended complaint was allowed by the Court, February, 19, 1982, and second because of the settlement agreement between the parties, approved by the Court on February 2, 1984. Leave to file an answer is denied for the reasons which follow.

18. This case was on the point of going to trial when defendants requested a continuance, informing the Court that a settlement agreement was a real possibility. Through the process of negotiation the parties reached a settlement agreement on January 31, 1984, consisting of the terms of Executive Order 4234, signed by the Governor on February 1, 1984, and approved by the Court the following day. (*Supra*, paras. 4 and 5).

19. Defendants request a trial on the grounds that all efforts to reach agreement with the plaintiffs on the provisions of a Plan to create "Comprehensive System of Health for the Mentally Retarded" have proved to be unavailing, that each and every plan proposed by defendants have been rejected by plaintiffs, that differences between the parties are "unsurmountable and, therefore, that defendants are withdrawing from further negotiations." In defendants' view the negotiations have broken down because of plaintiffs' unreasonable negotiation posture. Hence, they request a trial, basing their petition on the

Joint Agreement submitted by the parties on March 5, 1987, which was approved by the Court, page 9, sub-part E: "Once the parties agree on the Plan, and unless, in case of disagreement a hearing is requested before the Court. . . . " (*Supra*, para.6)

20. Defendants are misreading the language and intent of the Joint Agreement, page 9, sub-part E: "hearing" refers to a hearing on why negotiations have broken down, whether the responsibility for the failure to reach agreement rests with one or the other party, or perhaps with both in different degrees. There is nothing in the language of the Joint Agreement to even suggest that the failure of the parties to agree permits either party, unilaterally, to declare the Joint Agreement nullified and then to request a trial based on the pleadings. Quite the contrary. The Joint Agreement sets out only two possibilities: the parties reach agreement on the Plan, in which case it will be "presented to the Governor of the Commonwealth of Puerto Rico for his consideration and approval and, thereafter, submitted to this Court" and, in the alternative, failing agreement of the parties, either one may request a hearing before the Court. No third option is mentioned or contemplated. Of course, if both parties jointly requested the Court to nullify the settlement agreement and to set a date for a trial, it would be entirely appropriate to consider such a motion. But so long as plaintiffs insist on the binding obligation of the settlement agreement, defendants have no legal basis for unilateral abrogation.

21. The basic error in defendants' position is in its premise that the settlement agreement is the equivalent of a contract between equal parties, a contract to negotiate a plan, and that if a stalemate occurs in the negotiations, either party can unilaterally terminate the contract. But the settlement agreement is not simply a contract between private parties: It has received the approval of the Court, making it the equivalent of a consent decree. That is clear from the fact that the Court, explicitly, has final review

of the question of whether the Plan complies with the terms of the settlement agreement. Once the Court approved the settlement agreement, it assumed final responsibility for its enforcement and effectuation, and especially so in a matter involving constitutional and statutory rights.

22. Another basic error in defendants' position is the failure to understand the nature of a settlement agreement. In the motion for trial of December 17, 1987, at page 8, defendants stress that there is nothing in the settlement agreement that there was acceptance "in any measure that there were violations to the federal constitutional standards of care for the mentally retarded." If there had been acceptance of violations by defendants in the settlement agreement that would have been most atypical. Typically, a settlement agreement avoids admissions of responsibility and culpability with reference to the claims set forth in the complaint. Rather the parties agree to focus on affirmative action, foregoing their respective claims and defenses. That is what took place in this case. The complaint contained a number of alleged violations of constitutional and statutory rights. Defendants were entitled to put their defenses to the test of a trial, as were plaintiffs with respect to their claims. Both parties chose an alternative course: not to litigate through trial, but rather to reach settlement on the basis of a joint agreement under the aegis of the Court. The Joint Agreements, both on January 31, 1984 and on March 5, 1987, in effect substituted for the claims and defenses of the parties' complaint and answer a course of affirmative action which both parties implicitly recognized was remedial in nature. The Court's stamp of approval made it the ultimate guardian of the settlement agreement's enforcement. *See Local No. 93 v. City of Cleveland*, 106 S.Ct. 3063, 3075-76 (1986).

23. Although defendants in the December 17, 1987 motion regarding current status and request for trial take the position that the "Plan for Servicing the Population

With Mental Retardation, Fiscal Years 1987-88, 1988-89" complies with the settlement agreement (pages 6 and 7), when the latter plan was submitted by motion on September 21, 1987 it was referred to as "a feasible alternative to ensure services to the population with mental retardation while the remaining plan which will be fully operational by 1993 is designed by the Administrative Unit created for that purpose." (p. 2) From these two statements, and the emphatic denial by plaintiffs that defendants have complied with the settlement agreement, the only conclusion warranted at this stage is that from the motions filed by the parties it is impossible to determine whether the differences between them are indeed unsurmountable and, if the Court should determine that they are, which one or both of the parties are responsible for the present state of impasse and, finally, what remedial measures would be appropriate to effectuate the terms of the settlement agreement.

24. Though defendants' motion for trial is denied, it does raise issues of compliance with the terms of the settlement agreement. Accordingly, the motion for trial will be treated as a request for a hearing, as stipulated in the Joint Agreement when an impasse is reached. The request for a hearing will be held in abeyance until the Special Master has carried out the Court's instructions to fully investigate the reasons for the breakdown in negotiations, whether consensus is still feasible and, if not, why not, together with his recommendations, all of which will be reported to the Court and to the parties. The specific instructions to the Special Master are included in the Court's conclusions at the end of this Opinion.

JURISDICTIONAL ISSUES

25. Whether the Court has jurisdiction over this case is a question which has varied answers depending on when the question is asked. That is because since 1977, when the initial complaint was filed, there have been significant

case law developments, as well as Puerto Rican statutory and executive actions, which have affected the Court's jurisdiction. The scope of the Court's jurisdiction, as we shall see, has varied from a circumscribed minimum to a breadth covering the entire range of services for mentally retarded persons.

26. Prior to considering the jurisdictional history of this case, certain basic postulates should be explicitly recognized. First, federal courts are courts of limited jurisdiction. *See* Rule 8(a) Fed. R. Civ. P. When the issue is whether there is subject matter jurisdiction, a federal court cannot hear or decide a case unless a least one of the essential matters in controversy, as stated in the complaint, can be traced back to a federal constitutional or statutory source authorizing federal jurisdiction. *See* Fed. R. Civ. P., Rule 12(b). Second, neither party, or both acting in concert, can confer jurisdiction on a federal court when no jurisdiction exists. Even if neither party questions the court's jurisdiction, it is the judge's responsibility, acting on his own initiative to dismiss if convinced that there is a want of jurisdiction. *See, e.g. American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951). Hence, defendants' position—that though they "have questioned the Court's lack of jurisdiction, they have attempted to resolve this case in good faith through a process of negotiation" (page 2 of Motion of December 17, 1987)—is fundamentally in error. Either the Court has jurisdiction, or it has not: good faith is irrelevant to the question of jurisdiction. The point is illustrated concretely in the context of the present case. If at the time Executive Order 4234 issued the Court had no jurisdiction, the Governor could not have conferred federal jurisdiction. Executive Order 4234, standing by itself, without an existing source of federal authority to which it could be attached, would be incapable of creating federal jurisdiction.

27. In the first stage of the case there were two challenges to the Court's jurisdiction which were denied in

two opinions by Judge Torruella, on October 10, 1978 and December 20, 1979, respectively. Judge Torruella found that the complaint satisfied federal question jurisdictional criteria and, in addition, that there was pendent jurisdiction under Puerto Rican constitutional and statutory related provisions: the case arose under the 42 U.S.C. § 1983, the 5th, 8th and 14th Amendments of the United States Constitution, 42 U.S.C. § 6010 (§ 201 of the Developmentally Disabled Assistance and Bill of Rights Act), 29 U.S.C. § 794 (§ 504 of the Rehabilitation Act of 1973), Art. II, § 5 of the Constitution of the Commonwealth of Puerto Rico and Public Law 21, July 22, 1977; jurisdiction was specifically authorized by 28 U.S.C. § 1343. If plaintiffs presented proof at trial sufficient to support their allegations, he concluded that their federal and Puerto Rican constitutional and statutory rights had been violated, that the complaint constituted a real case or controversy, and he, therefore, denied the motion to dismiss. A number of Judge Torruella's comments bear repeating in light of their relevance to the case at this stage in its development. In his 1978 Opinion he cites *Scheur v. Rhodes*, 416 U.S. 232, 236 (1974):

> When a federal court reviews the sufficiency of a complaint before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that recovery is very remote and unlikely but that is not the test. Moreover, it is well established that in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

and on the constitutional duty with regard to services:

> . . .while it may certainly be true that there is no constitutional provision which imposes a duty on a state to provide services to its citizens, *Dandridge v. Williams*, 397 U.S. 471 (1970), and indeed the allocation of a State's limited resources is a matter for the State's legislature, *Jefferson v. Hackney*, 406 U.S. 535 (1972), it is equally true that once a State has taken upon itself to provide such services it must do so in a manner not contravening the Constitution. *Shapiro v. Thompson*, 394 U.S. 618 (1968).

and on the public policy of Puerto Rico, the Preamble and Statement of Motives of Public Law 21, July 22, 1977:

> . . .recognizes that the people of Puerto Rico have the duty to guarantee the right to an adequate education needed by the student population with physical, mental and emotional handicaps. We also consider that it is the most urgent need that a Special Education Program be established in the Department of Education. (Translation ours).

and noted that provisions of 29 U.S.C. § 794 were directly applicable to the alleged discriminatory denial of services:

> No otherwise qualified handicapped individual. . .shall solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

28. At the stage Judge Torruella ruled on the motions to dismiss for want of jurisdiction the Court had the maximum jurisdictional scope, including, as it did, all applicable federal and Puerto Rican constitutional and statutory provisions. But Judge Torruella had no way of anticipating future federal case law, nor action by the Governor of

Puerto Rico, which would have jurisdictional implications for the case. The first case to have an impact on his decision was *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). Speaking for the Court, Justice Rehnquist stated the issue as one of statutory interpretation: in enacting the Developmental Disabilities Assistance and Bill of Rights Act, did "Congress intend in § 6010 to create enforceable rights and obligations?" (p. 15). To the issue he responded in the negative:

> Congress in recent years has enacted several laws designed to improve the way in which this Nation treats the mentally retarded. The Developmentally Disabled Assistance and Bill of Rights Act is one such law. It establishes a national policy to provide better care and treatment to the retarded and creates funding incentives to induce the States to do so. But the Act does no more than that. We would be attributing far too much to Congress if we held that it required the States, at their own expense, to provide certain kinds of treatment. (pp. 31-2) (footnote omitted)

There was a partial concurrence by Justice Blackmun, and dissenting opinion by Justice White joined by Justices Brennan and Marshall.

The net effect of *Pennhurst* on this case was to make untenable plaintiffs' reliance on § 6010 of the Developmental Disabilities Assistance and Bill of Rights Act: § 6010 could no longer serve as one of the bases of plaintiffs' cause of action.

29. The next decision of the Supreme Court bearing on this Court's jurisdiction was *Youngberg v. Romeo*, 457 U.S. 307 (1982). As phrased by Justice Powell for the Court the issue in this case was:

> whether respondent, involuntarily committed to a state institution for the mentally retarded, has

> substantive rights under the Due Process Clause of the Fourteenth Amendment to (i) safe conditions of confinement; (ii) freedom from bodily restraints; and (iii) training or "habilitation." (p.309)

Youngberg too involved the Pennhurst institution and was also brought under 42 U.S.C. § 1983. Justice Powell concluded that Romeo, an adult, 33 years old, with an I.Q. between 8 and 10, who had been committed to Pennhurst by court order on the petition of his mother, did have constitutionally protected rights:

> In deciding the case, we have weighed those postcommitment interests cognizable as liberty interests under the Due Process Clause of the Fourteenth Amendment against legitimate state interests and in light of the constraints under which most state institutions necessarily operate. We repeat that the State concedes a duty to provide adequate food, shelter, clothing, and medical care. These are the essentials of the care that the State must provide. The State also has the unquestioned duty to provide reasonable safety for all residents and personnel within the institution. And it may not restrain residents except when and to the extent professional judgment deems this necessary to assure such safety or to provide needed training. In this case, therefore, the State is under a duty to provide respondent with such training as an appropriate professional would consider reasonable to ensure his safety and to facilitate his ability to function free from bodily restraints. It may well be unreasonable not to provide training when training could significantly reduce the need for restraints or the likelihood of violence. (p. 324)

and then went on to qualify the Court's holding:

> In determining whether the State has met its obligations in these respects, decisions made by the appropriate professional are entitled to a presumption of correctness. Such a presumption is necessary to enable institutions of this type—often, unfortunately, overcrowded and understaffed—to continue to function. A single professional may have to make decisions with respect to a number of residents with widely varying needs and problems in the course of a normal day. The administrators, and particularly professional personnel, should not be required to make each decision in the shadow of an action for damages. (pp. 324-5)

There was a concurring opinion by Justice Blackmun joined by Justices Brennan and O'Connor which espoused a more expansive view of constitutional rights, going beyond the "minimally adequate training required by the Constitution" as defined in the majority opinion, to include "such training as is reasonably necessary to prevent a person's pre-existing self-care skills from *deteriorating* because of his commitment." (p. 327) Chief Justice Burger in a concurring opinion denied that there was any "constitutional right to training, or 'habilitation', *per se*." (p. 329)

How much impact *Youngberg* had on this case is not entirely clear. If the constitutional rights it recognizes are understood to be limited to mentally retarded persons committed to state institutions, the impact is considerable. If it is understood to encompass all state institutions, including school and health programs the impact is somewhat less, but there is no doubt that the concept of "minimally adequate training required by the Constitution" tends to limit the scope of federal courts to provide anything greater than minimum safeguards and remedies, leaving to each state how far it wishes to go in providing superior services.

It would be fair to conclude that after *Youngberg* a significant part of the constitutional claims included in plaintiffs' complaint, as well as the remedies sought, were appreciably reduced, but what was left still satisfied subject matter federal question criteria. For example, the amended complaint alleges that some class members have been placed in psychiatric institutions which has resulted in a deterioration of their condition. The complaint also alleges that class members have in effect been denied equal protection of the laws. It may be assumed that the *Youngberg* criteria apply to the first example and, with respect to the second example that nothing in *Youngberg* precludes claims based on alleged denial of equal protection. Nor does anything in *Youngberg* exclude jurisdiction based on federal statutes, with the exception of § 6010 of the Developmentally Disabled Assistance and Bill of Rights Act, held in *Pennhurst* I not to create substantive rights, or exclude pendent jurisdiction based on state law and jurisprudence. The latter source of federal jurisdiction was not eliminated until a year and a half later in *Pennhurst* II.

How *Youngberg* criteria are to be applied is illustrated in *Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239 (2nd Cir. 1984). The Court of Appeals recognized the constitutional rights of residents of a New York State institution for mentally retarded to adequate food, clothing, shelter and medical care, to safe conditions and freedom from undue bodily restraints, whether voluntarily or involuntarily admitted, but not to "community placement" or "a due process right to any specific type of treatment or training beyond that geared toward safeguarding basic liberty interests." (p. 1250)

30. On January 23, 1984, 8 days before the settlement agreement between the parties in this case, the Supreme Court decided *Pennhurst* II, *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). It will be recalled that in *Pennhurst* I, three and a half years earlier, the

Supreme Court had held that the Court of Appeals reliance for decision on § 6010 of the Developmentally Disabled Assistance and Bill of Rights Act was in error and reversed and remanded. On remand the Court of Appeals once again rendered judgment for plaintiffs, this time basing its decision on Pennsylvania's Mental Health and Mental Retardation Act of 1966, as that Act had been interpreted by the Supreme Court of Pennsylvania. Injunctive relief was awarded to enforce the Pennsylvania Act's provisions guaranteeing adequate habilitation and the "least restrictive environment" approach in the care and treatment of mentally retarded persons.

The Supreme Court reversed by the closely divided vote of 5 to 4. Speaking for the Court, Justice Powell addressed the issue in the case which was dispositive: did the 11th Amendment prohibit the District Court from ordering state officials to act in accordance with state law? The Court responded in the affirmative. Though *Ex Parte Young*, 209 U.S. 123 (1908) was not overruled, it was restricted to suits challenging the conduct of state officials on federal constitutional grounds. *Young* was held to rest on the need to assure the supremacy of federal law, but must accommodate to the constitutional immunity of the States under the 11th Amendment. The need to accommodate competing interests is lacking when a plaintiff claims that state officials have violated state law. Under the latter circumstances, "a suit against state officials that is in fact a suit against a state is barred regardless of whether it seeks damages or injunctive relief." (p. 102) Hence the reliance of the Court of Appeals on pendent jurisdiction was constitutionally in error.

In reversing and remanding Justice Powell concluded with instructions to the Court of Appeals which left open alternative possibilities for the exercise of federal jurisdiction:

> The Court of Appeals upheld the judgment of the District Court solely on the basis of Pennsylvania's MH/MR Act. We hold that these federal courts lacked jurisdiction to enjoin petitioner state institutions and state officials on the basis of this state law. The District Court also rested its decision on the Eighth and Fourteenth Amendments and § 504 of the Rehabilitation Act of 1973. See *supra*, at 904. On remand the Court of Appeals may consider to what extent, if any, the judgment may be sustained on these bases. The court also may consider whether relief may be granted to respondents under the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6011, 6063 (1976 ed. and Supp. V). (pp. 124-5) (footnote omitted)

Footnote 35 instructed the Court of Appeals to consider *Youngberg* on the 14th Amendment issue, since it was not available when the District Court issued its decision.

Justice Brennan dissented and joined in Justice Stevens' dissent, as did Justices Marshall and Blackmun.

What effect did *Pennhurst* II have on this case? First, it stripped the Court of all pendent jurisdiction. Concretely, that meant that reliance in the complaint based on the Constitution of Puerto Rico, Article II, § 5, and Act No. 121 of 1977, was misplaced. Hence all allegations and remedies claimed which were grounded on Puerto Rican law and policy could no longer be considered bases for the Court's jurisdiction. Second, from footnote 35 it is fair to assume that the Supreme Court considered *Youngberg* applicable to the circumstances existing in Pennhurst State School and Hospital and, therefore, applicable equally to Commonwealth Puerto Rican institutions in which similar or closely related conditions might exist. Third, to what extent the federal statutes mentioned at the close of Justice Powell's opinion serve as the basis of federal

subject matter jurisdiction was left an open question and, therefore, as a potential basis for federal jurisdiction in Puerto Rico. Fourth, there is nothing in *Pennhurst* II to suggest that a suit could not be sustained under federal procedural due process or for denial of the equal protection of the laws. Fifth, nothing in *Pennhurst* II addresses the question of the remedial scope which should be allowed to a settlement agreement incorporated in a consent decree.

31. Eight days after *Pennhurst* II, on February 1, 1984, Governor Romero Barceló issued Executive Order 4234 which formed the substantive basis of the settlement agreement between the parties, and which in turn was approved by the Court. Executive Order 4234 is included in its entirety in paragraph 5, *supra*. Its purpose is set forth at the outset: to assign to the Assistant Secretary of Health for Mental Health "the responsibility of providing the comprehensive mental health services necessary to the minor and adult population with some type of mental retardation." The Executive Order then goes on to define mental retardation and the four classes of which it consists, to indicate that mental retardation services are provided by the Departments of Health, Education, and Social Services operating with federal and Commonwealth funds, to require that the latter programs and funds be identified so that they may be integrated under a single plan, to assign to the Department of Health the responsibility of evaluating, diagnosing and providing medical-psychiatric and psychological services to minors and adults who are mentally retarded, assigning the education of the mentally retarded to the Department of Education, stating that in the next session of the Legislature legislation must be adopted to order all concerned agencies, except the Department of Education, "to transfer to the Department of Health all budget, personnel, equipment and responsibilities they have in relation to the mentally retarded," and finally, stating that legislation must be approved to support

the comprehensive services needed by the mentally retarded population.

Having stated the problem, the need for action and the assignment of responsibilities, the Executive Order concludes:

> I, CARLOS ROMERO BARCELO, Governor of the Commonwealth of Puerto Rico, pursuant to the authority granted by law, herewith order the unification under the Department of Health of all existing services for the minor and adult population with some type of mental retardation, said unification is done with the purpose of once the existing services are identified and united, the Department of Health will formulate a comprehensive health services system for said population, incorporating the existing services and those newly created which are necessary and that, besides to gather all and each one of the topics mentioned in all the Whereas of this Executive Order.

And in the final paragraph of the Executive Order the Governor commits the government to specific time frames for developing and implementing the plan and the comprehensive service system:

> The identification of programs, services and funds must be done in a period not greater than 6 months since the date of this Executive Order. Once the programs services or funds have been identified, the mental Health Auxiliary Secretary of the Department of Health will have one year to elaborate the plan to unify these services and develop the services system; at the end of said year, the plan must be available for the consideration and approval by the Governor. Once said plan and the services system is approved, they must be developed and implemented in a period

not greater than 10 years. (Translation by defendants)

What were the legal effects of Executive Order 4234 on this case? First, it must be recognized that the settlement agreement between the parties of January 31, 1984 and the Executive Order are essentially one and the same document. The entire substantive and procedural content of the settlement agreement consists of Executive Order 4234, with the exception of the functions assigned to both parties in the formulation of the Plan. Therefore, when the Court approved the settlement agreement on February 2, 1984 it was inescapably incorporating the Executive Order into a Consent Decree. That was well understood by the parties, as the record makes clear. Justice Department attorneys who represented defendants in their negotiations with plaintiffs were actually acting as emissaries of the Governor. At one end of the negotiation process they represented defendant parties, at the other end they collaborated with the Governor's aids in the formulation of an Executive Order which would be acceptable to plaintiffs and, finally, to the Court. In realistic terms, Executive Order 4234 is the Governor's commitment to the plaintiffs to implement a public policy on mental retardation, and that public policy was incorporated in a Consent Decree, thereby becoming a commitment to the Court.

Second, only the Governor could enter into the commitment contained in Executive Order 4234. The Secretaries of Health, Education and Social Services individually, or acting in concert, did not have authority to "order the unification under the Department of Health of all existing services for the minor and adult population with some type of mental retardation," or to assign to the Department of Health the formulation of "a comprehensive health services system for said population, incorporating the existing services and those newly created which are necessary," or to order the Assistant Secretary for Mental Health "to

elaborate the plan to unify these services and develop the services system," all within specific time frames for the development and implementation of the public policy enunciated. Nor could the Secretaries, at the end of a year and a half, exercise the Governor's authority to review and approve the plan and system of services.

Third, the Governor's commitment, incorporated in the Court's Consent Decree had inescapable legal consequences. The formulation and implementation of a plan to provide by 1993 a comprehensive system of services "necessary to the minor an adult population with some type of mental retardation," was intended to be accomplished in accordance with generally accepted professional criteria for the care and treatment of the mentally retarded and, as well, all applicable legal criteria. No other intention can be imputed to the Executive Order, for to do so would impute to the Governor an irrational or fraudulent act. Thus it is only reasonable to assume that Executive Order 4234 intended that the Assistant Secretary for Mental Health, in formulating the plan for the comprehensive system of services, would adhere to applicable Puerto Rican constitutional and statutory standards. The contrary assumption would impute to the Governor a lawless intention and therefore must be rejected. Concretely this meant, for example, that Act 121 of 1977 would be followed as an essential element—providing special education for retarded minors—in the formulation of a plan to develop and implement a comprehensive system of services. That would be the only sound way to give meaning to the term "necessary" in the Executive Order's preamble: comprehensive services "necessary to the minor and adult population with some type of mental retardation." "Necessary" must be understood to encompass, as indicated before, both professional and legally applicable criteria.

Fourth, under the terms of the settlement agreement, as approved by the Court, there is an inescapable judicial review function. Final authority rests with the Court to

determine whether there has been compliance with the commitments made in the Executive Order. By issuing the Executive Order the Governor, as the prerequisite condition for the settlement agreement, consciously submitted to the Court's jurisdiction the terms of his Order. Compliance with the Executive Order is delegated in the Assistant Secretary for Mental Health, the Secretaries of Health, Education and Social Services and, incidentally, any other agency of the Commonwealth which under authority of the Governor has responsibilities for providing services to the mentally retarded. Failure to comply by the defendant parties, all government officials identified in the Executive Order, is in the first instance for the Governor to deal with, and if the failure is not resolved, it would then become the Court's responsibility to resolve it. This was made even more explicit in the March 5, 1987 Joint Agreement of the parties with respect to the formulation of the plan itself: the Plan "will be presented to the Governor of the Commonwealth of Puerto Rico for his consideration and approval and, thereafter, submitted to this Court." (p. 9) The Court's final authority is also applicable, of course, to failures of compliance by plaintiffs with the terms of the settlement agreement.

Fifth, by consenting to the Court's authority to review compliance with the terms of the settlement agreement, the Governor in effect waived the Commonwealth's immunity to suit under the 11th Amendment. Waiver is the inescapable consequence of the Governor's authorization to have Executive Order 4234 made the basis for the settlement agreement and, thereafter, to have it incorporated in the Court's Consent Decree. After *Youngberg* and *Pennhurst* II the scope of federal jurisdiction was probably insufficient to allow for review by this Court of whether the Commonwealth had formulated and implemented a plan to provide a comprehensive system of services for all the mentally retarded in Puerto Rico. Executive Order 4234 followed *Pennhurst* II by eight days. Defendants had the

option to rely on it and to refuse to implicate any part of Commonwealth law in the law suit. Had they done so, it is entirely improbable that there would have been a settlement agreement, and this case would then have gone to trial. Defendants chose, rather, to settle the law suit on the basis of Executive Order 4234, which they did with the authorization of the Governor. His authorization included consent to review by the Court of the Executive Order's implementation, a function which is only compatible with authorization to apply all relevant Commonwealth law. Hence the Court's conclusion that from the date Executive Order 4234 issued, February 1, 1984, the *Pennhurst* II limitations on the Court's jurisdiction no longer applied.

Sixth, the Court has acted on the premise of 11th Amendment waiver since February 2, 1984 when it incorporated the terms of the settlement agreement, including Executive Order 4234, in an Order which has the effect of a Consent Decree. The parties in their actions and interrelations similarly acted on the same premise, as exemplified in the Joint Agreement of March 5, 1987. It was not until December 15, 1987, almost four years after the Executive Order and the settlement agreement, that defendants claimed that the Court had no jurisdiction to review and assure implementation of the terms of Executive Order 4234. Defendants' claim would only have merit if at the time the Executive Order issued there had been a total absence of federal jurisdiction. That is so because if there had been no federal jurisdiction to which Commonwealth law could have attached, the Court would have been without authority to accept a settlement agreement based entirely on pendent jurisdiction. But as concluded earlier, that was not the case. After the decision in *Pennhurst* II the Court unquestionably continued to have jurisdiction over this case, though the latter case in combination with *Youngberg* undoubtedly reduced the scope of its jurisdiction.

Seventh, when the Governor issued Executive Order 4234 authorizing it to become the basis for a settlement agreement in federal court, he in effect transformed the case from a suit against state officials into one "that is in fact against a State," which would be "barred regardless whether it seeks damages or injunctive relief," (*Pennhurst* II, p.102), were it not for the fact that the Executive Order constituted an unequivocal waiver of the Commonwealth's immunity from suit under the 11th Amendment. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). The waiver extended not only to Commonwealth constitutional and statutory law, but also to all federal legislation not applicable to states without their consent, legislation which would be needed by the Court to review and enforce the plan to create and implement a comprehensive system of services for the mentally retarded. *Cf. Atascadero State Hospital v. Scanlon*, 105 S.Ct. 3142 (1985), in which the Supreme Court decided 5 to 4 that California had not consented to be sued for violation of § 504 of the Rehabilitation Act simply because of the fact that it had accepted federal funds; unequivocal consent was required. In *Atascadero* there was no executive order, or any settlement agreement, but rather the adversary process was carried through to final decision, whereas in this case settlement was substituted for trial and the settlement was based on the Governor's Executive Order which, in turn, was incorporated in a Consent Decree.

Eighth, defendants rely on *Lelsz v. Kavanagh*, 807 F.2d 1243 (5th Cir. 1987), but quaere how much light that case throws on the question of this Court's jurisdiction? In *Lelsz* the Court of Appeals for the 5th Circuit vacated the judgment of District Judge Sanders ordering the transfer of 279 institutionalized mentally retarded to community centers. Circuit Judge Jones held that Judge Sanders lacked jurisdiction on two grounds: that it was not at all clear that the Order was authorized under the terms of the Resolution and Settlement between the parties, but as-

suming that it was, there still was no jurisdiction because the Order was based on State law, and under *Pennhurst* II a federal court cannot decide a case solely in the exercise of pendent jurisdiction without violating the 11th Amendment—unless the State consented to the federal court's jurisdiction. Since there had been no consent, the Court held, a settlement agreement by itself provided no basis for jurisdiction unless grounded on the vindication of federal rights, a condition not satisfied by Judge Sanders' Order. The judgment of the district court was vacated and remanded for further proceedings consistent with the Court of Appeals' decision. There was a dissenting opinion by Judge Wisdom, criticizing the expansive application of *Pennhurst* II, and indicating that plaintiffs were entitled on remand to a *Youngberg*-type hearing.

The instant case is distinguishable from *Lelsz* on three grounds: first, this case has yet to develop the equivalent of a Resolution and Settlement, and the Court has yet to issue an Order enforcing any provision of a plan because a plan has yet to be formulated which is acceptable to the parties, approved by the Governor and submitted to the judgment of the Court; second, in *Lelsz* there was a settlement, but not one based on an executive order of the Governor of Texas, nor can the Resolution and Settlement be considered a waiver of the State's immunity from suit, since it was accepted by State officials prior to the decision in *Pennhurst* II; and third, in this case the Governor of the Commonwealth of Puerto Rico issued Executive Order 4234 after *Pennhurst* II, and authorized it to form the basis of the settlement agreement. Hence *Lelsz* must be considered inapposite to the instant case.*

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* The continuing vitality of *Lelsz v. Kavanagh* as a case should be noted. The Court of Appeals decision issued on January 21, 1987. On remand Judge Sanders held an evidentiary hearing from June 29 through July 7, 1987 on the plaintiffs' motion for contempt because of abuses at the Texas institutions and for

Ninth, it is also essential, after Executive Order 4234, to clarify the role of plaintiffs in this case. Though the substantive provisions of the settlement agreement consist

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violation of provisions of the Resolution and Settlement between the parties. In a lengthy Memorandum Opinion and Order Judge Sanders found the defendants in contempt for their failure to comply with the provisions of the Resolution and Settlement grounded on federal and statutory rights. Judge Sanders relied on *Youngberg* criteria and held the following federal statutes to be applicable to the enforcement of the Resolution and Settlement: the Social Security Act (Medicaid), 42 U.S.C. §§ 1396 *et seq.*, the Education of All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401 *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.* The parties and intervenors were given until October 16, 1987 to file their recommendations for remedying defendants' non-compliance. 673 F.Supp. 828 (N.D.Tex., August 13, 1987.)

It should also be noted that three months prior to Judge Sanders' Memorandum Opinion and Order, a Court of Appeals panel, on petition for rehearing, reiterated its holding that "the district court on remand may not enforce the consent decree in a way that requires the state to provide care to mental patients in the least restrictive environment" because that would be the enforcement of a state law, but went on to add, "we do not decide what other remedy, if any, may be appropriate upon either the agreement of the parties or upon the district court's determination of federal law violations requiring further relief. *Lelsz v. Kanavagh*, 815 F.2d 1034, 1035 (5th Cir. May 4, 1987). The decision was Per Curiam. On the same day a request by one of the Circuit Judges for a rehearing by the Court En Banc was denied by a vote of 7 to 7. Circuit Judge Reavley wrote a dissenting opinion, criticising the expansive interpretation which the two panels had given to *Pennhurst* II, and arguing in favor of the district court's remedial powers under the Resolution and Settlement agreement between the panel's denial of a rehearing stated that as Senior Circuit Judge he could not vote on the petition for a rehearing en banc, but had he been authorized, he would have voted in favor of an en banc rehearing. For

entirely of the provisions of Executive Order 4234, plaintiffs remain parties with two basic functions: first, to negotiate with defendants for the purpose of preparing the plan to be submitted to the Governor and thereafter to the Court, and second, once the plan has been approved and gone into effect, to periodically evaluate how it is working in practice and to bring to the Court's attention any failure of compliance. As indicated earlier, at this stage of the case's development the Court has not reached any conclusion on the question of responsibility for the current failure of the parties to agree on the Plan to create a comprehensive system of services for the mentally retarded.

32. To sum up the Court's jurisdiction in this case: first, the scope of the Court's jurisdiction was reduced by *Pennhurst* I and II and limited to minimal criteria of substantive due process by *Youngberg*; second, by authorizing the incorporation of Executive Order 4234 in the settlement agreement, the Governor effectively waived the Commonwealth's immunity from suit; and third, this had the effect of expanding the Court's jurisdiction to the limits of constitutional and statutory possibility, under both federal and Commonwealth law, needed to carry out its judicial responsibility to enforce the goals of the settlement agreement that a plan be formulated and implemented to provide the comprehensive services "necessary to the minor and adult population with some type of mental retardation."

RELATED FEDERAL AND PUERTO RICAN CASES

33. Notice must be taken of the fact that this is not the only case involving the mentally retarded in Puerto

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another panel decision restricting the scope of the district court's remedial powers, *see Lelsz v. Kavanagh*, 824 F.2d 372 (5th Cir., August 14, 1987).

Short of review by the Supreme Court of the United States, there is no way to predict the final outcome of the *Lelsz* case in the Fifth Circuit.

Rico. In addition, there are to the knowledge of the Court at least two other cases which overlap the jurisdictional field of this case: *Ana Maria Benitez v. Collazo*, Civil No. 77-0662, before District Judge Consuelo Cerezo and *Rosa Lydia Velez v. Maria Socorro Lacot, et al.*, Civil No. 80-1738, before Superior Court Judge Arnaldo López Oliver. In the first case an unspecified number of the class are retarded minors with emotional disorders. In the second case the class consists of all retarded minors entitled to special education under applicable Commonwealth and federal law. The latter case was brought to the Court's attention by defendants' motion of November 1, 1987.

In *Ana Maria Benitez* a stipulated agreement in partial settlement was reached by the parties and was adopted and incorporated in an Order on August 27, 1982. Thereafter, the parties on October 22, 1985, responding to the Court's Order of August 1, 1985, agreed on a candidate for Monitor, Ana María López Guillen, and their recommendation was affirmatively ratified by the Court. On August 15, 1986 the Monitor in collaboration with the Secretary of Social Services prepared a "Corrective Action Plan and Projections." Clearly, *Ana Maria Benitez* is far more advanced toward solution than the instant case.

Rosa Lydia Velez v. Maria Socorro Lacot is a class action on behalf of retarded minors who alleged that they had not received the special education to which they were entitled under federal and Commonwealth law. On September 10, 1981 Superior Court Judge Peter Ortiz issued a temporary injunction to begin the process of bringing into compliance with law the Special Education Program of the Commonwealth's Department of Public Education. On March 30, 1984 Judge Ortiz appointed Ledo. Alberto Omar Jiménez Special Commissioner to represent the Court in accelerating compliance by defendants. The work of the Special Commissioner, in collaboration with the parties and the responsible officials is on the verge of completing a detailed manual for dealing with the entire range of special

education problems affecting mentally retarded minors. This litigation too is far more advanced toward solution than is true of the case before this Court.

It would seem undeniable that the Plan required under the terms of the settlement agreement in this case must include among its components what has been accomplished and what is planned for the future in both the *Ana Maria Benitez* and *Rosa Lydia Velez* cases. Both must be taken into account in the preparation of a plan to provide a comprehensive system of services for the mentally retarded in Puerto Rico. That being so, it would make eminent good sense to investigate the feasibility of achieving a working collaboration of the judges in the latter two cases and the Court in these cases. Collaboration by all three judges would at the least assure a sharing of information and at best a high degree of coordination and, perhaps, even a sharing of responsibilities. In any case, the possibilities of collaboration should be explored. To that end the Court has included instructions to the Special Master in the conclusions of this Opinion.

CONCLUSIONS

1. The Court has jurisdiction over this case. Specifically, it has jurisdiction to enforce the settlement agreement of January 31, 1984, as amended by the Joint Agreement of March 5, 1987.

2. Defendants' Motion regarding request for trial is DENIED.

3. Defendants' Motion submitting answer to the amended complaint is DENIED.

4. The Special Master is instructed to meet with the parties to determine whether consensus can be reached on a Plan as mandated by the settlement agreement and, if consensus should prove to be unavailing, to report to the Court on who is responsible for the failure of compliance,

with his recommendations on how the Court should proceeed.

5. The Special Master is instructed to meet with the Monitor in the *Ana Maria Benitez* case, and with the Special Commissioner in the *Rosa Lydia Vélez* case, for the purpose of preparing a proposal for inter-Court collaboration, to be considered by the three judges with responsibilities for ongoing litigation in the field of mental retardation in Puerto Rico.

6. In view of the four years which have transpired since the settlement agreement was reached, a delay which is fast becoming intolerable, the Special Master is instructed to act with all diligence.

7. The Special Master will report to the Court every sixty days on the results of his efforts.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 26th day of February, 1988.

/s/ RLA
RAYMOND L. ACOSTA
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1423

VICTOR RAMIREZ, ETC., ET AL.,
Plaintiffs, Appellees.

v.

JAIME RIVERA DUENO, ETC., ET AL.,
Defendants, Appellants.

JUDGMENT

Entered November 17, 1988

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The appeal is dismissed and the cause is remanded to the district court for further proceedings consistent with the opinion filed this day.

No costs.

By the Court:

Francis P. Scigilano
Clerk.